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Case Western Reserve Law Review

Volume 54 | Issue 2

2003

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Subha Ghush

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Recommended Citation

Subha Ghush, *Deprivatizing Copyright*, 54 Case W. Res. L. Rev. 387 (2003)
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol54/iss2/5>

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DEPRIVATIZING COPYRIGHT

Shubha Ghosh[†]

INTRODUCTION

James Madison's tersest justifications for the proposed powers of the new federal legislature were reserved for what was to be Article I, Section 8, Clause 8, now referred to as the Intellectual Property Clause.¹ According to Madison, Congress's power "to promote the progress of science and useful arts, by securing for a limited time, to authors and inventors, the exclusive right, to their respective writings and discoveries" was of unquestionable utility.² For Madison this power was necessary because individual states could not effectively protect the copyright of authors and the right to useful inventions.³ More importantly, according to Madison, by granting the federal legislature the power to protect authors and inventors, "the public good fully coincides . . . with the claims of individuals."⁴

The coincidence of the public good and individual claims echoed the Enlightenment confidence that private vice, transformed into private interest, could be the basis for public virtue.⁵ While patent law has for the most part lived up to Madison's ex-

[†] Professor of Law, University at Buffalo, SUNY, Law School; J.D., Stanford; Ph.D., Economics, Michigan; B.A., Amherst College. I would like to thank Guyora Binder, Oren Bracha, David Engel, Craig Joyce, Fred Konefsky, Michael Madison, Betty Mensch, Robert Reis, David Vaver and seminar participants at the University at Buffalo Law School and the Oxford Intellectual Property Research Center for invaluable comments and patience.

¹ For usage of the term "Intellectual Property Clause," see Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119; Edward D. Walterscheid, *The Nature of the Intellectual Property Clause: A Study in Historical Perspective* (pt. 1), 83 J. PAT. & TRADEMARK OFF. SOC'Y 763 (2001).

² THE FEDERALIST No. 43, at 217 (James Madison) (Buccaneer Books 1992).

³ *Id.*

⁴ *Id.*

⁵ See ALBERT O. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH* 42-48 (1977) (describing interests as a new paradigm); EMMA ROTHSCHILD, *ECONOMIC SENTIMENTS* 29-34 (2001) (describing the vision of the state during the Enlightenment).0

pectations,⁶ the history of copyright law has been a relative disappointment. Since the enactment of the first federal copyright act by Congress in 1790,⁷ the securing of the rights of an author for a limited time has not been guided by the invisible hand to the promotion of the public good. The history of copyright law in the United States has involved the perfection of copyright into a private property right, rather than a means to serve the public good. Since much cultural production occurs in corporate settings, such as television and motion picture conglomerates or large software companies, the protection of authors as a means of enriching the public sphere with cultural creations has been transformed into the protection of business interests.⁸ This tendency has reached its zenith with the Supreme Court's decision in *Eldred v. Ashcroft*, which, by upholding Congress's power to extend the copyright term, seemingly granted perpetual rights at the expense of the public domain.⁹ Furthermore, especially with the passage of the Digital Millennium Copyright Act ("DMCA") in 1998 and sundry post-9/11 legislation seeking to limit the activities of libraries, universities, and other institutions designed to foster the development and dissemination of knowledge, the directive to promote the progress of science seems subservient to the need of protecting private security through the control of information flow.¹⁰ Somehow, the public good that Madison emphasized in his brief paragraph has

⁶ There is a sizeable literature criticizing the patent system. Although there have been occasional movements throughout history for the abolition of patents, much of the current patent literature seems more focused on technical details of the patent act. Some critics of copyright, however, state the entire enterprise is obsolete and perhaps unnecessary. For a sense of the patent literature, see James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 56-57 (2003) (describing movements in the nineteenth century to abolish patents in Europe and citing to works critical of patents in the U.S.); Mark A. Lemley, *Rational Ignorance at the Patent Office*, 95 NW. U. L. REV. 1495, 1496-97 (2001) (addressing several critics of patent practice). For a sense of the assault on copyright, see Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 272-75 (2002) (describing technological changes that undermine copyright law's foundations).

⁷ Copyright Act of 1790, ch. 15, 1 Stat. 124 (entitled "An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned"); Copyright Act of 1909, ch. 320, 35 Stat. 1075 (entitled "An Act to amend and consolidate the Acts respecting copyright").

⁸ See, e.g., JESSICA LITMAN, *DIGITAL COPYRIGHT* 22-34 (2001).

⁹ *Eldred v. Ashcroft*, 537 U.S. 186, 198, 241 (2003) (holding that while Congress cannot establish perpetual copyright, it has the power to extend a copyright term retroactively); see also *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 123 S. Ct. 2041, 2050 (2003) (stating that Congress cannot establish perpetual copyright).

¹⁰ See, e.g., Matt Jackson, *Using Technology to Circumvent the Law: The DMCA's Push to Privatize Copyright*, 23 HASTINGS COMM. & ENT. L.J. 607, 637-39 (2001); L. Ray Patterson, *The DMCA: A Modern Version of the Licensing Act of 1662*, 10 J. INTELL. PROP. L. 33, 33-34 (2002); Jason Sheets, *Copyright Misused: The Impact of the DMCA Anti-Circumvention Measures on Fair & Innovative Markets*, 23 HASTINGS COMM. & ENT. L.J. 1, 19-21 (2000).

been lost, and copyright has turned into an unqualified private right. This change raises questions not only about copyright's past (how did we get to this point?), but also about copyright's future (where do we go from here?).

The contemporary crisis in copyright centers on the question of whether copyright law serves to protect certain essential private property interests, or whether copyright law is informed by public, regulatory values.¹¹ This Article is offered as a challenge to those who advocate the first view, and as succor to those who are persuaded by the second. To conceive of copyright as essentially private property, akin to rights in land, is to ignore the important historical and realist tradition that has envisioned real property as an instrumental construct designed to pursue certain social and political goals, as opposed to protecting pre-social and pre-political rights.¹² If analogies to real property are to be taken seriously, the realist critique of real property needs to be evenhandedly applied to copyright's status as property. Once copyright is understood through the realist lens, however, the social and political ends of copyright emerge and become distinct from the ends of real property. Rights in real property aid in structuring land-based economic, social, and political systems. Copyright, in contrast, has aided the creation of cultural products historically, and the creation of information-based economic, social, and political systems more recently. Understanding how the goals of copyright differ from those of real property facilitates the second agenda of copyright as a public minded, regulatory endeavor. These goals are summarized in what I refer to in this Article as the privatization thesis.

My thesis is that while Madison saw in copyright a coincidence of private interest and public good, historically copyright, with its roots in the Statute of Anne,¹³ originated and has developed as a devolution of the sovereign's role in cultural produc-

¹¹ See, e.g., Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27 (2000) (presenting a critique of the trespass paradigm in cyberspace); Julie E. Cohen, *Lochner in Cyberspace: The New Economics Orthodoxy of "Rights Management,"* 97 MICH. L. REV. 462 (1998) (describing the role of *Lochner* in shaping the private property interest view); Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217 (1996) (discussing copyright as property).

¹² See Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 8-14 (1927); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470-79 (1923); Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 212-21 (1937). For a recent history, see BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 90-99* (1998). For a recent discussion of these issues in the context of cyberspace and intellectual property, see Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295 (1998).

¹³ Statute of Anne, 1710, 8 Ann., c.19 (Eng.).

tion.¹⁴ This devolution has, over time, led to an expansion of private rights over various forms of expressive activities, including literary works, musical works, software, architectural works, and emphasized in this Article, model legislation, religious texts, and encryption technology. The contemporary debate over copyright reflects this devolution, which has been accelerated through decades of deregulation in such diverse areas as the airlines, telecommunications, financial services, law enforcement, pollution control, education, and income distribution policy. Hence, the title of this Article: the time has come to recognize both copyright law as a form of privatization and the need to deprivatize copyright in order to realize the public good that Madison envisioned.

Some readers may be struck by my assertion of “the sovereign’s role in cultural production.”¹⁵ This assumption, while perhaps unquestionable during the age of monarchy and patronage,¹⁶ may seem less credible for modern democracies, where cultural production is largely the activity of non-governmental entities. The hallmark of democracy is the liberalization of the arts and a movement away from the promotion of a national, uniform culture as in the former Soviet Union or Nazi Germany. I am not, however, using the word *culture* in this paper synonymously with *nation* or *people*, as the word is sometimes used.¹⁷ Instead, the term *cultural production* refers to the creation of cultural artifacts such

¹⁴ The argument I propose in this Article exemplifies Professor William Fisher’s fourth justification for intellectual property: the use of property rights to share and foster “the achievement of a just and attractive culture.” William Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 172 (Stephen R. Munzer ed., 2001). As Professor Fisher points out, this justification is ends-oriented, like utilitarianism, but incorporates “visions of a desirable society richer than the conceptions of ‘social welfare’ deployed by utilitarians.” *Id.* Professor Fisher is critical of this fourth justification, which he calls the “social-planning perspective,” because its application rests on ultimately indeterminate questions about the social good. *Id.* at 192-94. I am not sure that the social-planning perspective is any more or less indeterminate than the utilitarian perspective, which also requires determinations of what constitutes social welfare. Much of the literature on cultural economics addresses some of the difficult questions raised by Fisher, and also enriches the utilitarian approach with a consideration of values other than utilities. See DAVID THROSBY, *ECONOMICS AND CULTURE* 19-41 (2001) (discussing the meaning of value in economic theory and its relationship to culture).

¹⁵ See TYLER COWEN, IN PRAISE OF COMMERCIAL CULTURE 36-40 (1998) (arguing that government, in its role as a consumer of arts, leads to bureaucracy and a decline of dynamism); WILLIAM D. GRAMPP, PRICING THE PRICELESS: ART, ARTISTS, AND ECONOMICS 205-31 (1989) (making the claim that government funding for the arts is rent-seeking). Neither Professor Grampp nor Professor Cowen address the issues I raise in Part I, *infra*. Instead, they each start from a presumption of market efficiency, and ignore institutions other than the market and values other than efficiency.

¹⁶ For a discussion of the varied meanings of patronage, see GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 57-60 (1991).

¹⁷ See, e.g., WILL KYMLICKA, MULTICULTURAL CITIZENSHIP 18-19 (1995) (using “culture” to mean a nation or a people); THROSBY, *supra* note 14, at 3-4 (analyzing the evolution and different usages of the term “culture”).

as written texts, visual icons, musical arrangements, and other embodiments of social and communal meaning. When cultural production is understood as the creation of cultural artifacts, the sovereign's role in cultural production becomes more compelling in democracies in particular, as my discussion of public goods theory and the theory of democracy indicates in Part I.

My broad point is that the sovereign's role in cultural production in democracies has its roots in the battles over cultural production, particularly the creation of literary texts, during the seventeenth and eighteenth centuries. These battles culminated in the passage of the Statute of Anne in 1710, the foundation of modern copyright law. The enactment of this statute represented a devolution of the role of the sovereign in cultural production. As Professor Mark Rose states, "The passage of the statute marked the divorce of copyright from censorship and the reestablishment of copyright under the rubric of property rather than regulation."¹⁸ Democratic governments continue to have a role in cultural production, a role implied by Madison's reference to the "public good" with respect to copyright. This role, as I elaborate below, is to address the need to subsidize the arts financially, provide cultural infrastructure, such as libraries, schools, and other fora for public discussion, and protect minority representation in cultural productions.¹⁹ In a democratic culture, this role is a controversial one, and to the extent that this role is carried out through copyright, the controversy is exacerbated by copyright's roots in the Statute of Anne and the debates over literary property and publishing in the seventeenth and eighteenth centuries. Recognizing these roots will aid in addressing many of the tensions in copyright today.

Recently, privatization has drawn the attention of several legal scholars committed to understanding the proper forms of regulation, markets, and state institutions.²⁰ These scholars specifically

¹⁸ MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 48 (1993).

¹⁹ See CRITICAL CULTURAL POLICY STUDIES: A READER 13-42 (Justin Lewis & Toby Miller eds., 2003) (analyzing policies intended to develop cultural works); JAMES HEILBRUN & CHARLES M. GRAY, *THE ECONOMICS OF ART AND CULTURE* 219-50 (2001) (providing reasons why government should fund the arts); TOBY MILLER & GEORGE YUDICE, *CULTURAL POLICY* 1-34 (2002) (describing the history of cultural policy in the United States); THROSBY, *supra* note 14, at 137-52 (discussing the rationale for government-funded cultural policy); Margaret J. Wyszomirski, *Background on Cultural Policies and Programs in the U.S.*, in *COMPARING CULTURAL POLICY: A STUDY OF JAPAN & THE UNITED STATES* 113, 113-202 (Joyce Zemans et al. eds., 1999); Margaret J. Wyszomirski, *Philanthropy and Culture: Patterns, Context, and Change*, in *PHILANTHROPY AND THE NONPROFIT SECTOR IN A CHANGING AMERICA* 461, 461-80 (Charles T. Clotfelter & Thomas Erlich eds., 1999) (discussing the overlay of philanthropy on cultural production).

²⁰ See MARTHA MINOW, *PARTNERS, NOT RIVALS* 7-22 (2002). The March 2003 Harvard

have focused on different ways in which privatization can occur, such as private contracting for government services, the reliance on non-profit private associations for the delivery of social services, and the use of private charitable donations in lieu of taxation as a means of fiscal finance. Professor Freeman, in reviewing the movement towards privatization, makes an argument for a “counterintuitive way to view American privatization trends.”²¹ According to her argument, privatization, instead of shrinking government, allows government’s reach to expand. As she states, “privatization can be a means of ‘publicization,’ through which private actors increasingly commit themselves to traditionally public goals as the price of access to lucrative opportunities.”²² By developing a theory of copyright as privatization in this Article, my goal is to revive a public-spirited copyright law in ways that I explicate below.

Copyright, as an example of privatization, seems distinct from more traditional examples, such as trash collection, electricity generation, and prison management. Nonetheless, there are both historical and doctrinal bases for viewing copyright through the lens of privatization.

The historical support for considering copyright within the theoretical structure of privatization is provided by copyright’s roots in the English system of licensing and the guild system of publishing and bookselling. Even though it would be inaccurate to call these systems “privatization” in the contemporary sense,²³ I discuss this early history to show the connection between sovereign power and private right that marked early English copyright. In fact, this intimate connection between governmental power and private property is ignored both by writers who see the birth of copyright as the creation of property and by writers who see copyright as a pure regulatory system. I argue that the privatization theory reconciles these two conflicting interpretations of English history. I further argue that American copyright history also supports my privatization thesis. The language of the Intellectual

Law Review dedicates its pages to a symposium on privatization and the ideas raised by Professor Minow’s book. The symposium is entitled “Public Values in an Era of Privatization.” I will cite various ideas from articles in this symposium, but the article by Jody Freeman, *infra* note 21, is the most apposite to mention in the introduction.

²¹ Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1285 (2003).

²² *Id.*

²³ See, e.g., Malla Pollack, *Purveyance and Power, or Over-priced Free Lunch: The Intellectual Property Clause as an Ally of the Takings Clause in the Public’s Control of Government*, 30 SW. U. L. REV. 1, 6-7 (2000) (discussing different tools of government used by the crown and adopted by the United States).

Property Clause supports the conclusion that private property rights were intended to be a means towards a public end, and not an end in themselves. My thesis is also supported by the reflection of republican conceptions of property in the debate over international copyright in the 1830s. In short, the early English and American copyright history suggests that copyright originally was not simply a private property right.

Three current doctrinal problems in copyright further illustrate my privatization thesis. The first is the debate within copyright over granting a property right to drafters of model codes and standards that are eventually enacted into legislation or regulatory rules.²⁴ As I have described in a previous paper, there is currently a split among the federal circuits on the issue of the copyrightability of law.²⁵ The controversy illustrates one way in which copyright serves to privatize the most basic of governmental functions – the drafting of laws. The second example involves several controversial cases arising from intra-denominational disputes over biblical and other sacred texts.²⁶ Scholars of privatization have noted with caution the increasing blurring of the line between church and state, particularly in the areas of school choice and care of the indigent.²⁷ The involvement of federal courts in these disputes of copyright provides another example of this blurring.²⁸ The third, and final, example of the relationship between copyright and privatization is the role of the Digital Millennium Copyright Act and other legislation that regulate encryption and decryption

²⁴ See, e.g., *Veeck v. S. Bldg. Code Cong. Int'l*, 293 F.3d 791 (5th Cir. 2002) (holding that the law of municipalities could not be copyrighted; therefore copying the codes would not be considered copyright infringement).

²⁵ Shubha Ghosh, *Copyright and Functional Expression*, 50 J. COPYRIGHT SOC'Y U.S.A. 71, 86-87 (2003).

²⁶ See, e.g., *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000) (holding that a religious organization had no implied license to use a book written by the pastor of another religious organization, and that its copying and distribution of the book constituted unfair use). For an excellent recent survey of cases involving copyright and religion, see Thomas F. Cotter, *Gutenberg's Legacy: Copyright, Censorship, and Religious Pluralism*, 91 CAL. L. REV. 323 (2003).

²⁷ See MINOW, *supra* note 20, at 68-84; Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1230 (2003); David Saperstein, *Public Accountability and Faith-Based Organizations: A Problem Best Avoided*, 116 HARV. L. REV. 1353, 1354 (2003); Kathleen M. Sullivan, *The New Religion and the Constitution*, 116 HARV. L. REV. 1397, 1398 (2003).

²⁸ Furthermore, copyright's role as a tool in contemporary religious disputes has roots in the controversies surrounding the drafting of the King James Bible in the seventeenth century, and the authorship and ownership of religious texts. In the late twentieth and early twenty-first centuries, copyright is critical in determining whether a religious organization can publish and sell its religious texts in order to generate revenues to fund its many activities, including those that have been devolved from the government. See ADAM NICOLSON, *GOD'S SECRETARIES: THE MAKING OF THE KING JAMES BIBLE* 65-70 (2003); ROSE, *supra* note 18, at 49-66.

technologies.²⁹ In many ways, the DMCA marks a return to the pre-Statute of Anne days where control of publishing was largely a means of censorship and regulation, as described by Professors Patterson and Rose.³⁰ By creating a private cause of action against decryption, the act provides a third illustration of the devolution of the government's censorial role to a private entity in a manner that circumvents the state action requirement of the First Amendment.

My argument to deprivatize copyright law is organized as follows. Part I presents a theoretical framework for understanding the government's role in cultural production and privatization. Part II examines the historical record described above in light of this framework. Part III's focus is on three doctrinal examples of privatization: model codes, religious texts, and the DMCA. Part IV develops the implications of the theory and evidence for three elements of copyright: copyrightable subject matter, fair use, and the First Amendment.

I. COPYRIGHT AND THE THEORY OF PRIVATIZATION

Although much has been written about privatization, a general definition of the term in the scholarly literature is elusive.³¹ Pro-

²⁹ Digital Millennium Copyright Act, Pub. L. No. 105-304, § 103, 112 Stat. 2860, 2863-76 (1998) (codified at 17 U.S.C. §§ 1201-1205 (2000)). Under the DMCA, "[n]o person shall circumvent a technological measure that effectively controls access" to a copyrighted work. *Id.* § 1201(a). The DMCA has been a source of controversy because of its use against hackers and academics who engage in decryption research to break the code that controls access to entertainment media such as DVDs and electronic books. The DMCA creates a private cause of action allowing a party who uses a technological measure to protect a copyrighted work to go after the circumventor, and also creates what can be described as a private subpoena power. See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) (motion picture studios brought an action under the DMCA to enjoin websites from posting software that could decrypt digitally encrypted movies on DVDs); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 253 F. Supp. 2d 943 (E.D. Ky. 2003) (manufacturer of printer toner cartridges sued manufacturer of replacement cartridges under DMCA); *In re Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24 (D.D.C. 2003) (action brought under DMCA involving the downloading of songs from an Internet Service Provider), *rev'd*, *Recording Indus. Ass'n of Am. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 69 U.S.P.Q.2d 1075 (D.C. Cir. 2003); *U.S. v. Elcom, Ltd.*, 203 F. Supp. 2d 1111 (N.D. Cal. 2002) (defendant was indicted for alleged violations of DMCA anti-circumvention provisions); *Felten v. RIAA*, No. 01-CV-2669 (GEB) (D.N.J. Nov. 28, 2001) (action brought by researchers to challenge DMCA and determine that publication of research was protected speech), information available at http://www.eff.org/IP/DMCA/Felten_v_RIAA.

³⁰ See Patterson, *supra* note 10, at 35; ROSE, *supra* note 18, at 12-13.

³¹ Professor John Donahue, in his classic study of privatization, divides the definition of privatization along two dimensions, finance and performance, and concludes that the privatization decision requires "fidelity to the public's values." JOHN D. DONAHUE, *THE PRIVATIZATION DECISION* 7-12 (1989). Two political scientists have recently defined privatization as "the use of nongovernmental organizations to run government programs," but they limit this definition by stating that it applies "in most cases," not all cases. MATTHEW A. CRENSON & BENJAMIN GINSBERG, *DOWNSIZING DEMOCRACY: HOW AMERICA SIDELINED ITS CITIZENS AND PRIVATIZED ITS PUBLIC* 202-03 (2002). A recent collection of readings on governance refers to the term several times without offering a definition. Instead, the collection of readings characterizes

fessor J.G.A. Pocock characterizes privatization as a state of mind. Privatization, as he describes, entails a movement from a condition under which an individual, as political animal, engages in "reasserting his own civic being, or renewing its principles" to a condition under which an individual's world "will be primarily conventional and subjective, and only experience (and the state of the market) will tell him how far his opinions concerning reality are founded upon truth."³² In other words, privatization marks a shift from the centrality of the political and civic spheres to the centrality of the market and individual experience.

Professor Pocock's description captures the spirit of privatization and aids in devising an operational definition. For the purposes of this Article, I define privatization as the delegation of the decision-making function historically assigned to a governmental entity to a non-governmental entity. This definition emphasizes two important elements in the privatization debate: the locus and the mechanism for decision making. For example, when a democratically elected state government delegates the management of prisons to a corporate, for-profit entity, what is key is that the locus of decision making shifts from a democratically accountable body to an institution that bases its management decisions on the maximization of profit. Analogously, when I speak of the privatization of the government's role in cultural production, what is key is that private entities interacting through contract and exchange

privatization among the many tools available to government. Lester Salamon, *The New Governance and the Tools of Public Action: An Introduction*, in *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* 1, 3 (Lester M. Salamon ed., 2003) [hereinafter *TOOLS OF GOVERNMENT*]. The lack of a definition reflects two problems: (1) the blurring of a distinction between privatization as a means and privatization as an end, and (2) the difficulty in drawing a distinction between public and private. As to the first problem, note that the scholars discussed in this paragraph sometimes describe privatization as an end in itself, and sometimes as a means to achieve public goals such as efficiency or transparency. The second problem is well studied in the literature. See *supra* note 12.

A recent contribution to this literature by philosopher Raymond Geuss highlights the several difficulties. The first is the problem of defining the public in universal terms that somehow finds a common set of interests among disparate sets of groups, such as cyclists, gardeners, land developers and hunters. RAYMOND GEUSS, *PUBLIC GOODS, PRIVATE GOODS* 95-96 (2001). The second is recognizing that private is often seen in terms of what should be protected from interference by the state, suggesting the public as a residuum category. *Id.* at 80. Finally, these tensions are exacerbated by the fact that public and private are not discrete categories, but a continuum based on more rudimentary notions of ownership and control. *Id.* at 7-8. As Geuss states, "[the distinction between private and public] concerns the modes of access, control, and ownership of property or information, with special reference to the issue of whether this access, control, and ownership is restricted or limited in any way." *Id.* at 6. The description is tantalizing in its ambiguity. From whose vantage point (an individual or a state institution?) are the notions of ownership and control defined, and what institution or entity is the source of the limitation or restriction on control, access, and ownership?

³² J. G. A. POCKOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 460 (1975).

replace deliberative or authoritarian bodies in the creation of culture.

Three concepts – culture, market, and government – comprise the heart of this Article. As I explained in the introduction, the word *culture* is used here to refer to cultural artifacts, as opposed to national or other forms of identity. Many cultural artifacts, such as television programs, movies, or songs, are familiarly created and distributed through the market. However, government plays a role in many of these markets presumably to correct market failures. Copyright is one example of such intervention. To say that government facilitates the market for culture is not to say that government creates culture. The creation of particular artifacts and their consumption by the public is undertaken by actors outside the sphere of the government. It would be equally mistaken, however, to say that creators and consumers of cultural artifacts are acting in a purely private manner, regulated solely by the rules of the marketplace. Copyright law determines the manner in which the market operates, and hence affects the types of cultural artifacts that are created and the manner in which they are distributed. It is this relationship among culture, market, and government that is the focus of this Article.

A simple example may illustrate this point. Imagine a world without copyright, meaning a world in which creators of works could not prevent others from appropriating their work either through reproduction, adaptation, or performance.³³ There is no reason to think that absent copyright, cultural artifacts will cease to exist. But the types of cultural artifacts created and the manner of distribution would be different. It is conceivable that absent copyright, there would be much more imitation. Creators, instead of expending effort to develop highly original and creative works, would copy the latest cultural fashions. It is equally conceivable that little would be published at all, especially by those who feared ready imitation and copying. Publishers would rely on first entry into cultural marketplaces in order to make the venture profitable, creating works that are difficult to imitate. Entry barriers would also be created through technological limitations or through the creation of customer loyalty to known and tried celebrity authors. In some ways, the landscape without copyright would look similar

³³ For examples of such thought experiments, see PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 17-19 (1994); Stephen Breyer, *Copyright: A Rejoinder*, 20 *UCLA L. REV.* 75 (1972); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 *HARV. L. REV.* 281 (1970); Barry W. Tyerman, *The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer*, 18 *UCLA L. REV.* 1100 (1971).

to the current world, but in many ways, we could expect the landscape to be altered. The point is that copyright law, as regulation, shapes the marketplace for cultural artifacts. Government, markets, and culture are intimately linked.

The current debate in copyright is over the proper alignment of the government, markets, and culture in properly structuring the entitlements granted by copyright law to creators. For many, the current structure grants too broad a scope of rights to copyright owners without any tractable limiting principle. In practice, the Supreme Court's decision in *Eldred v. Ashcroft* allows Congress to extend the duration of rights indefinitely, if not perpetually.³⁴ Decisions in the areas of derivative work rights and fair use also broaden the set of new works that a copyright owner can enjoin or allow to exist upon licensing. Optimal market design has been touted as one source of limitation. For example, Wendy Gordon has classically argued for fair use as a resolution to the problem of market failure in transacting over certain types of spontaneous or high transaction cost uses.³⁵ Robert Merges, in writing on parodies and other derivative works, has seen the need for a robust market as a reason for allowing fair use for parodies.³⁶ His test for parody as fair use would recognize fair use when the copyright owner has seemingly irrationally refused to license the creation of a value added work. Finally, Paul Goldstein has argued that the limiting principle is market incentives; the scope of the copyright entitlement should be broad enough to incentivize the creation of new works and no broader.³⁷ The end that the market serves acts as a governing principle to regulate the creation of cultural products.

The problem with the market baseline is that it rests on the assumption that private interest working through market transactions will lead to public good. But there are many reasons to think that the invisible hand will not be operating in the arena of cultural production. The invisible hand operates best in competitive environments, but cultural production may not occur through competition. Certain cultural forms will dominate, and although cultural tastes change, cultural transition does not occur through the price regulated, market-clearing mechanism of the invisible hand. A deeper problem is that the market principle, whether in the form of

³⁴ 537 U.S. 186 (2003).

³⁵ See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982).

³⁶ See Robert P. Merges, *Are You Making Fun of Me?: Notes on Market Failure and the Parody Defense in Copyright*, 21 AM. INTELL. PROP. L. ASS'N Q.J. 305 (1993).

³⁷ See Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209 (1983).

market failure or adequate incentives, provides no limiting principle at all for copyright. For example, according to Professor Gordon's formulation, once transaction costs are removed (perhaps through more service markets, such as the creation of copyright intermediaries, or through technological advances), fair use would become unnecessary. Furthermore, while Merges' formulation of fair use assumes that economic value is all that a copyright owner should care about, it may be perfectly reasonable for an artist to protect the integrity of a work. Finally, the incentive-based limitation offers little limit at all on copyright's scope because it is not possible to say how much is too much to incentivize the creation of works, particularly in the current milieu where multi-million dollar blockbusters are the ideal. Why shouldn't the copyright owner have the world if people are willing to pay? While markets are certainly important for the creation and dissemination of cultural products, finding a limit to copyright in the goals of the market is illusory.

Neil Netanel has offered a similar critique of market theory in copyright. I am probably more sympathetic to markets than he is, but I agree wholeheartedly that current market theorists in copyright do not offer an adequate answer to the question of how broad the copyright owner's rights should be.³⁸ Professor Netanel offers the values of democratic pluralism as a substitute for the market-based values of other copyright scholars. Democratic pluralism limits copyright by emphasizing copyright's goal of fostering open and diverse discourse that supports the development of markets and government.³⁹ The argument I develop in this Article offers support for Professor Netanel's claims by developing a coherent theory of copyright that takes into consideration culture, markets, and government. Copyright provides broad public functions that inform the private right of copyright owners. By placing copyright law in the broader skein of privatization,⁴⁰ I hope that copyright policy makers will recognize the public values that form the basis for copyright law.

To make the case that copyright is a form of privatization, I need to show that, through copyright law, the state is delegating a government function to a private party. Two obstacles confront this argument. The first is identifying the government function that copyright law is facilitating. I have described this function as

³⁸ See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 306-11 (1996).

³⁹ See *id.* at 324-35.

⁴⁰ See MINOW, *supra* note 20, at 68; Salamon, *supra* note 31, at 1.

cultural production, and for some, categorizing cultural production as a government function would be seen as an error. As the scholar David Throsby points out, the production of cultural works in the United States is understood in libertarian terms: The activity is purely private.⁴¹ This description, however, may in fact be a reflection of my argument that copyright is a means of privatization, especially since other countries, including many Western democracies, relegate a large role to the government for the promotion and creation of the arts. Furthermore, Professor Throsby's description of the United States ignores the role that both federal and state governments play in subsidizing and regulating cultural activities.⁴² This role includes the construction of theaters and museums, grants to artists and performers, and art promotion. Needless to say, state and federal governments have reduced their role in the United States over the past decades, but the government's involvement, even in the supposedly libertarian United States, suggests that cultural production has been in part a government function. The purpose of this section is to provide more theoretical bite to this reality. In Parts I.A and I.B, I develop a theory of government functions that critiques the economic theory of public goods as applied to copyright, and I develop an alternative foundation for copyright in the theory of democratic governance.

The second obstacle to my characterization is identifying the mechanisms through which copyright privatizes the government function of cultural production. Political scientists and public policy analysts point to two principal ways in which government carries out its functions: through direct production and through financing by taxes and subsidies.⁴³ When the government devolves

⁴¹ THROSBY, *supra* note 14, at 145-46; *see also* JOHN W. O'HAGAN, THE STATE AND THE ARTS: AN ANALYSIS OF KEY ECONOMIC POLICY ISSUES IN EUROPE AND THE UNITED STATES 8-11 (1998) (describing the evolution of government spending on the arts in the United States).

⁴² *See* MILLER & YUDICE, *supra* note 19, at 35-71 (discussing cultural policy in the United States); O'HAGAN, *supra* note 41, at 11-13; RUTH TOWSE, CREATIVITY, INCENTIVE, AND REWARD: AN ECONOMIC ANALYSIS OF COPYRIGHT AND CULTURE IN THE INFORMATION AGE 167 (2001) (discussing the pervasiveness of art subsidization in the United States); Dick Netzer, *Non Profit Organizations*, in A HANDBOOK OF CULTURAL ECONOMICS 331, 331-41 (Ruth Towse ed., 2003) (describing non-profit organizations' involvement with the arts); Margaret J. Wyszomirski, *Background on Cultural Policies and Programs in the U.S.*, in COMPARING CULTURAL POLICY: A STUDY OF JAPAN & THE UNITED STATES 113, 113-202 (Joyce Zemanns et al. eds., 1999).

⁴³ *See* DONAHUE, *supra* note 31, at 53-55; Christopher Howard, *Tax Expenditures, in TOOLS OF GOVERNMENT*, *supra* note 31, at 410; Steven J. Kelman, *Contracting*, in TOOLS OF GOVERNMENT, *supra* note 31, at 282; Mark H. Moore, *Introduction*, 116 Harv. L. Rev. 1212, 1213 (2003); Lester M. Salamon, *The Tools Approach and the New Governance: Conclusion and Implications*, in TOOLS OF GOVERNMENT, *supra* note 31, at 600; David E. M. Sappington & Joseph E. Stiglitz, *Privatization, Information and Incentives*, 6 J. POL'Y ANALYSIS & MGMT. 567 (1987).

a government function, the government either contracts for the production of an activity that it once directly produced, or the government seeks funding from private sources. An example of government contracting is provided by the privatization of prisons.⁴⁴ The appeal to charitable giving and funding of voluntary services for the indigent by religious, non-profit, and corporate groups is an example of the devolution of the financing activity of government.⁴⁵ Copyright, I argue, is a hybrid of the production and the financing roles of government. By the grant of a copyright, the government protects private production of cultural products. The protection granted to private parties allows for the collection of economic rents, which in turn can finance creative activities.⁴⁶ In Part I.C, I present the mechanisms through which copyright law privatizes the government functions identified in the theory of democratic governance.

The lesson to be drawn from the theory is that copyright is not purely a private right. It is a private right secured to further a public purpose. The theoretical analysis I develop in this section helps in identifying the public values that inform copyright.

A. A Critique of Copyright's Foundation in Public Goods Theory

The current justification for copyright law is grounded in the economic theory of public goods.⁴⁷ Public goods theory provides a justification for copyright law as a response to market failure. In this section, I argue that the economic theory of public goods is inadequate for defining the government's role in cultural production for two reasons. First, public goods theory is applied in a categorical manner by legal scholars without proper consideration of the underlying legal rights at tension in copyright and in public goods theory. Second, the theory starts from a presumption that markets are the appropriate baseline for social allocation of resources. As I argue, an equally compelling benchmark is one of

⁴⁴ See MINOW, *supra* note 20, at 151-52.

⁴⁵ *Id.* at 50-120.

⁴⁶ See William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 328 (1989).

⁴⁷ See RICHARD CORNES & TODD SANDLER, *THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS* 10-13 (1986); Kenneth J. Arrow, *The Organization of Economic Activity: Issues Pertinent to the Choice of Market Versus Nonmarket Allocation*, in *PUBLIC EXPENDITURE AND POLICY ANALYSIS* 67, 67-81 (Robert H. Haveman & Julius Margolis eds., 1970). For the importance of this concept in contemporary discussions, see the set of essays published in *GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY* (Inge Kaul et al. eds., 1999) and *PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION* (Inge Kaul et al. eds., 2003). Both of these volumes were prepared for the United Nations Development Programme.

democratic governance.⁴⁸ Such a benchmark, while not rejecting markets, provides a more comprehensive approach to the theory of government and cultural production, grounded in the values of *autonomy* and *participation*. The approach is more comprehensive because it permits consideration of both efficiency and non-efficiency goals, as well as of institutions other than markets. The benchmark of democratic governance does not reject the economic approach I critique here, but introduces a more institution-minded view of economics that addresses the gaps in public goods theory.⁴⁹

1. *Efficiency Goals and the Theory of Public Goods*

In this section, I address public goods theory, a body of economic scholarship that is often cited as a foundation for intellectual property law generally and copyright specifically. I argue that the application of public goods theory is not satisfactory because of implicit assumptions about markets and a lack of consideration of the institutional details pertinent to government and the creation of markets. In contrast to the public goods approach, I propose an institutional approach that focuses on the relative advantages of different types of social, political, and economic arrangements for cultural production. This approach, I argue, asks the relevant legal question in understanding government functions: What should be the rights and obligations of parties in the domain of cultural production?

Textbook economics justifies government policy on grounds of market failure. When a private, unregulated market cannot be trusted to allocate commodities in a way that maximizes efficiency, measured usually by the surpluses earned by consumers and producers in the marketplace, the argument for government policy of some form is made. Much of the debate in copyright law scholarship is grounded in the notion of a public good.⁵⁰ In fact, many economics textbooks illustrate a public good with the exam-

⁴⁸ For an argument similar to the one developed here, see PETER DRAHOS & JOHN BRAITHWAITE, *INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY?* 189-92 (2002) (advocating the creation of democratic property rights that recognize the values of representation, full information, and non-coercion); Netanel, *supra* note 38, at 341-44.

⁴⁹ The institutional economics approach I speak of here is influenced by the work of Professors Edward L. Rubin and Neil K. Komesar. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES* 98-122 (1994); NEIL K. KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 42-60 (2001). For a distillation and extension of Professor Komesar's ideas, see Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Micro-analysis of Institutions*, 109 HARV. L. REV. 1393, 1393-95 (1996).

⁵⁰ For a recent exposition of the literature, see Philip J. Weiser, *The Internet, Innovation, and Intellectual Property Policy*, 103 COLUM. L. REV. 534, 546 n.35 (2003) (citing to literature on copyright and public goods).

ples of national defense, natural resources, and a song.⁵¹ The juxtaposition of these three examples, however, conflate their many crucial differences. But from the perspective of traditional economics, national defense, natural resources, and a song have one thing in common: because they are examples of public goods, the government must be involved in their provision.

The term *public good* by itself creates difficulties. For those who hear the phrase for the first time, public good may be understood as synonymous with public welfare or well-being. But the word *good* is being used in the sense of a commodity, either a product or service. When a good is public, according to textbook economic theory, the good cannot be allocated through a decentralized price mechanism.⁵² Instead, the public realm must be involved in the good's allocation. The concept of a public good is understood in relationship to a price system, and the failure of a price system to function is a reflection of the conditions necessary for a market economy. Therefore, the category of a public good is by itself not useful. To call something a public good is in some ways to resolve the question of government provision without looking at more basic institutional and technological issues.⁵³

Textbook economics posits two primitive concepts in defining a public good: rivalry and excludability.⁵⁴ Rivalry means that my consumption of one unit of a commodity precludes your consumption.⁵⁵ Excludability means that a commodity has an owner who can keep others from consuming the commodity.⁵⁶ According to economic theory, a market can allocate a commodity if the commodity is both rival and excludable in consumption. If one of these conditions fails, then the market fails as an institution for promoting an efficient allocation of resources.

Standard examples illustrate these ideas. A loaf of bread is a commodity that is both rival and excludable. A buyer's consumption of a specific loaf of bread precludes others from consuming

⁵¹ See, e.g., STEPHEN SHMANSKE, PUBLIC GOODS, MIXED GOODS, AND MONOPOLISTIC COMPETITION 3-4, 10-11 (1991) (describing ubiquity of the public goods problem and providing an example of a song as a public good). For an excellent discussion of public goods from a theory of distributive justice, see LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 45-48 (2002).

⁵² See CORNES & SANDLER, *supra* note 47, at 6-7; Arrow, *supra* note 47, at 67-81.

⁵³ For a good criticism of the use of public goods theory in copyright from a rights perspective, see I. Trotter Hardy, *Not So Different: Tangible, Intangible, Digital, and Analog Works and Their Comparison for Copyright Purpose*, 26 U. DAYTON L. REV. 211, 224-26 (2001).

⁵⁴ See SHMANSKE, *supra* note 51, at 6-7 (defining public goods in terms of rivalry/non-rivalry and excludability/non-excludability).

⁵⁵ *Id.* at 9.

⁵⁶ *Id.* at 7-8.

that same loaf. Similarly, if the buyer chooses not to consume the loaf he has purchased, he can exclude others from possessing that loaf through legal or other means. A natural lake located within a subdivision is excludable because access to the lake can be restricted (by trespass law or by a fence) to residents of the subdivision. But among the group of people who can utilize the lake, the lake is not rival. My swimming in the lake does not prevent your ability to make use of the lake. Notice that the concept of rivalry deals with competing uses, but not necessarily conflicting uses. My swimming in the lake may interfere with your fishing, but we can still use the lake in a non-rivalrous manner. Fugitive property, such as underground oil or water, is an example of a commodity that is rival but non-excludable. Since the resource flows across many property lines, it would be difficult for one landowner to prevent another landowner from accessing the resource. However, one's consumption of the resource can limit another's consumption, as can be seen when one landowner pumps the entire amount of the resource from underground. Finally, the last category involves goods that are non-rival and non-excludable, the textbook case of the public good.

Theorists use the concepts of rivalry and excludability to create a taxonomy of goods that aids the policy maker in determining the appropriate institutional arrangement for the allocation of a commodity.⁵⁷ The categorization of a commodity as private means that a decentralized market mechanism is appropriate. Categorization as public supports government provision. Categorization in one of the other two categories means a mixed public-private system is required. Through these categories, the proper role of government is understood to be the provision of public goods and intervention into the marketplace when a commodity is either non-rivalrous or non-excludable. Many analyses of copyright law, for example, are based on the categorization of the subject matter of copyright (songs, books, computer software, etc.), as being either non-rivalrous, non-excludable, or both.

The taxonomy approach, however, is far from satisfying in identifying government functions in cultural production. The concept of a public good presumes a decentralized market as the de-

⁵⁷ See ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 8-15 (1990) (critiquing the taxonomical approach for reducing the problem of provision to a choice between Leviathan and privatization); Charlotte Hess & Elinor Ostrom, *Ideas, Artifacts, and Facilities: Information as a Common-Pool Resource*, 66 LAW & CONTEMP. PROBS. 111, 118-21 (2003) (arguing that scholars sometimes confuse the taxonomy of the commodity with the problem of property rights).

fault.⁵⁸ In other words, the concepts of rivalry and excludability are used to determine when a market is not an appropriate institutional mechanism for allocating commodities. However, it would make just as much sense to start out with the government, the family, or some other non-market institution as the default provider of products and services, and ask when the market is an appropriate institution by which to allocate goods. One reason why the problem is not posed this way in economic textbooks is because of the sophisticated models and theories that have been developed by economists over the past one hundred years to analyze market systems and price mechanisms.⁵⁹ Prices are easy to quantify and represent in mathematical terms.⁶⁰ The types of command and hierarchical arrangements that describe the functioning of governments are more difficult to quantify, although recent developments in game theory and information economics permit a more sophisticated treatment of government agencies as a means of allocating goods.⁶¹ While the taxonomic approach to identifying government functions appears useful, the bias towards decentralized allocations calls into question its value, especially for those who may believe that governments in fact do more, and in theory should do more, than correct markets.

Furthermore, the taxonomy is misleading in its ability to cleanly sort out the functions of government from those of other institutions. In illustrating rivalry and excludability, I deliberately chose examples from property law. My point is to show that rivalry and excludability rest upon assumptions of legal rights and obligations. Since the structure of legal rights and obligations determine rivalry and excludability, and legal rights and obligations rest upon government, it is circular to view the concepts of rivalry and excludability as primitives that determine when a particular commodity falls within the domain of the government.⁶² One way to resolve this circularity is to define rivalry and excludability in purely technological terms. For instance, in the example of the lake, the lake could be made rival by placing buoys on it in strate-

⁵⁸ See, e.g., Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975, 988 (2002) (discussing presumptive efficiency of markets in market failure analysis).

⁵⁹ See DONALD E. CAMPBELL, *RESOURCE ALLOCATION MECHANISMS* 39-64 (1987) (providing an overview of the area of economics known as general equilibrium theory).

⁶⁰ See THEODORE M. PORTER, *TRUST IN NUMBERS: THE PURSUIT OF OBJECTIVITY IN SCIENCE AND PUBLIC LIFE* 3-8 (1995) (examining the importance of objectification for the efficacy and validity of policy making).

⁶¹ KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 49, at 3-4; see OSTROM, *supra* note 57, at 7-8 (discussing information economics).

⁶² See OSTROM, *supra* note 57, at 50-55 (describing the problem of public goods as one of defining appropriate rules and rights in a specific institutional setting).

gic locations, making it difficult to swim. Furthermore, a fugitive resource could be made excludable if one property owner injected a secret chemical into the water or the oil, making the resource worthless to anyone who could not identify the chemical and remove it. But these technological means of defining rivalry and excludability do not resolve the logical problem. The ownership of these technological means would still be a legal issue of rights and obligations, based perhaps on trade secret or patent law.

The circularity problem in defining a public good strongly echoes the realist critique of the private/public distinction and the critical legal studies critique of neutrality.⁶³ My purpose in raising these issues is not, however, to trash the literature on public goods theory, particularly as it has been applied to copyright and other areas of intellectual property. Rather, my goal is to distill the economic understanding of government function into the primitive questions of rights and obligations that are an important part of the institutional approach to law and economics. The institutional approach is not concerned with the question of creating a taxonomy that maps onto a set of existing institutions. The aim of the institutional approach is to understand the function of institutions in implementing rights and obligations instrumentally to reach certain goals.⁶⁴ Instead of asking when governments should intervene into the market to promote efficiency, the institutional analysis would focus on the structure of rights and obligations in various institutional settings, which would include not only market institutions, but also state agencies, as well as non-governmental institutions such as families, churches, and voluntary associations.

In the area of copyright, the work of Elinor Ostrom on "the commons" provides a good example of the institutional economics approach I am endorsing here.⁶⁵ The institutional approach teaches us to focus on how to structure rights and obligations over various types of resources that can be allocated through institutional arrangements broadly labeled "the commons."⁶⁶ The example of a song illustrates the contrasting approaches. According to the economics textbook, a song is non-rival and non-excludable, and hence a public good. Since a song is a public good, it must be provided with government support, perhaps through copyright law

⁶³ See FRIED, *supra* note 12, at 23 (discussing Kantian and Lockean views of property rights); Gerald Turkel, *The Public/Private Distinction: Approaches to the Critique of Legal Ideology*, 22 LAW & SOC'Y REV. 801, 801-02 (1988); *supra* text accompanying note 28.

⁶⁴ See KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 49, at 20-21 (critiquing the single institution focus of law and economics scholars such as Judge Richard Posner).

⁶⁵ OSTROM, *supra* note 57, at 29-57.

⁶⁶ *Id.* at 1-28.

or perhaps through a subsidy to the songwriter. My critique of this analysis recognizes that a song could be made rival and excludable if one person was given the exclusive right to sing or listen to the song. In other words, claims of rivalry and excludability rest on the background legal rights and obligations. Under an institutional approach, we would ask a different question that focuses on these rights and obligations: What are the implications for various rights and obligations over a song that are embodied in institutional arrangements, such as a market or a government agency? Once these implications are analyzed, they need to be assessed in terms of whatever policy, social, or legal goals the decision maker needs to consider.

What are the various goals of copyright? Inge Kaul, in her critique of public goods theory, offers three values that undergird most public goods arguments, such as the ones that have been traditionally made for copyright.⁶⁷ According to Kaul, arguments based on public goods theory rest on three public concerns: (1) publicness in distribution of benefits, (2) publicness in consumption, and (3) publicness in decision making.⁶⁸ In applying these concerns to copyright, I make some slight modifications. First, what Dr. Kaul labels publicness in distribution of benefits also entails a question of distribution of costs, particularly the large fixed costs associated with large-scale creation. I analyze these public concerns in Part I.A.1.a under the label of the fixed cost problem. Second, her category of publicness in consumption is what I refer to as the issue of sharing, and is discussed in Part I.A.1.b. Finally, the question of publicness in decision making entails the issues of democratic values, the subject of Part I.B.

a. Public Goods Theory and the Fixed Cost Problem

In explaining why the government plays a role in cultural production, many scholars point to the ease with which many cultural products can be duplicated once produced. The cost structure of public goods is canonically described in two parts.⁶⁹ The first is

⁶⁷ Inge Kaul, *Public Goods: Taking the Concept into the Twenty-First Century*, in *THE MARKET OR THE PUBLIC DOMAIN? GLOBAL GOVERNANCE AND THE ASYMMETRY OF POWER* 255, 258-65 (Daniel Drache ed., 2001).

⁶⁸ *Id.* at 265.

⁶⁹ See Basil L. Copeland, Jr. & Alan Severn, *Price Theory and Telecommunications Regulation: A Dissenting View*, 3 *YALE J. ON REG.* 53, 71 n.78 (1985) (discussing public goods in terms of "non-rival consumption and high exclusion costs"); Shubha Ghosh, *Turning Gray into Green: Some Comments on Napster*, 23 *HASTINGS COMM. & ENT. L.J.* 563, 567-69 (2001); Gillian K. Hadfield, *The Economics of Copyright: An Historical Perspective*, 38 *COPYRIGHT L. SYMP. (ASCAP)* 1, 23-24 (1992) (discussing fixed costs and public goods rationales for copyright in the writings of Adam Smith).

the high fixed costs of production that result in declining average costs of production. The second is the low marginal cost of distribution. Put in less technical terms, while a creator may incur huge costs in creating a work of art, anyone, absent legal or technological protections, can listen to a song, memorize the notes, and write them down to be played back later or distributed to others. Similarly, books can be read, plays can be watched, and paintings studied for reproduction at a later time. Because of the almost negligible marginal cost associated with distribution, the creator of cultural products, it is argued, needs to be protected from unauthorized appropriation. It is this argument that is often couched in the language of public goods theory. Since a song can be reproduced at a low marginal cost, consumption of the song is non-rival and non-excludable, and therefore government intervention is needed to protect the interest of the creator.

This argument, however, is not wholly a public goods argument. The argument is about declining average costs and low marginal costs, and originated in the late nineteenth century in the legal and economics literature as the "fixed cost controversy."⁷⁰ The issue arose in the context of the inefficacy of unbridled competition in industries, such as the railroad, which had high fixed costs. In such industries, it was argued, the high level of fixed costs, relative to production dependent costs, resulted in low marginal costs. Unbridled competition, with its tendency to reduce price to marginal cost, would result in the price within high fixed costs industries being brought down to zero, forcing most firms into bankruptcy until one dominant firm emerged in a natural monopoly. Because of this problem, some form of government intervention was needed in high fixed cost industries, either through relaxed antitrust standards or through direct regulation. The fixed cost controversy became the basis for much government regulation, particularly rate regulation, in the nineteenth and twentieth centuries.

In the context of cultural products, the relevance of the fixed cost controversy becomes apparent when scholars juxtapose the existence of low marginal costs of distribution with the existence of high fixed costs of production. Government intervention of some form is needed because the low marginal cost of distribution creates adverse incentives to produce the cultural product in the

⁷⁰ See HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW: 1836-1937, at 308-22 (1991); Herbert Hovenkamp, *The Antitrust Movement and the Rise of Industrial Organization*, 68 TEX. L. REV. 105, 125-26 (1989).

first place.⁷¹ For example, the potential creator of a television miniseries of *Bleak House* or *White Teeth* may not embark on the endeavor if someone can copy the final product and distribute it via videotape or the Internet. The fear of unrestricted copying, the argument goes, reduces incentives to produce the miniseries. Unbridled competition through copying would result in destructive competition and the failure of creators to produce works.

Recognizing certain types of public goods arguments as arguments based on fixed costs illustrates one primary function that the government has in cultural production: cost allocation.⁷² Even if cultural production is viewed purely as a private matter – the result of individual, decentralized initiative – the government has a role in underwriting the cultural activities financially.⁷³ The patronage of the Medici and other monarchs illustrates the role the government plays in addressing the financial risks associated with cultural production. The continuing funding of the arts through grants and other financial support, even in democracies, demonstrates the importance of the government's role in allocating costs for cultural production.⁷⁴ Furthermore, once the financial role of the government in cultural production is recognized, the devolution of this function through copyright law can be better appreciated. But before the process of devolution is explored, one other important government function must be recognized, a function that is very different from the financial role described here.

b. Public Goods Theory and Shared Consumption

While one strand of public goods arguments involves fixed costs, another strand entails arguments about the value of sharing. Sharing in the context of cultural production refers to the benefits that arise from consuming or enjoying a particular commodity in a group, rather than individually.⁷⁵ The term *sharing* captures the

⁷¹ See TOWSE, *supra* note 42, at 10-15 (asserting that ease of distribution affects economic incentives of production).

⁷² See, e.g., William J. Baumol, *Economics of Athenian Drama: Its Relevance for the Arts in a Small City Today*, 85 Q.J. ECON. 365, 365-76 (1971); William J. Baumol, *Panel Discussion: Public Support for the Arts*, 9 COLUM.-VLA J.L. & ARTS 214, 220-22 (1984) (describing three social benefits government considers when determining the budget for the arts); Mervi Taalas, *Costs of Production*, in A HANDBOOK OF CULTURAL ECONOMICS 152-60 (Ruth Towse ed., 2003) (discussing cost allocation among various cultural institutions).

⁷³ See, e.g., *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 573-77 (1998) (describing the history and role of the NEA).

⁷⁴ See JAMES HEILBRUN & CHARLES M. GRAY, *THE ECONOMICS OF ART AND CULTURE* 219-49 (2d ed. 2001); O'HAGAN, *supra* note 41, at 30-32 (discussing economic spillover of government-funded arts).

⁷⁵ See, e.g., ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 48-64 (2000) (discussing sharing); Michael J. Meurer, *Copyright Law*

difference between a holiday dinner consumed in a group and a meal consumed alone in one's private home. Many cultural products are valuable precisely because they are consumed by other people. While I may enjoy reading Thomas Pynchon or Margaret Atwood by myself, I benefit from knowing that others have also read their works. These benefits include the ability to converse about the works to gain deeper insights, and the possibility of communicating new insights and understandings that I may have missed in my private reading. Sharing does not mean that there is a unity of interest or understanding; my reading of *Gravity's Rainbow* or *The Blind Assassin* may be radically different from yours. It is the communal aspects of reading and consumption that create important values for cultural products.

Textbook economics would characterize what I call the values of sharing as either consumption externalities or network effects. There are problems with each of these concepts. A consumption externality arises when one individual's consumption choices affect another individual's well-being.⁷⁶ Cases from the law of nuisance provide examples of consumption externalities. According to economic theory, the presence of consumption externalities requires market intervention through some form of regulation. The key to resolving the problem of consumption externalities is permitting the correct pricing of these external effects so that they become internalized into private decision making.⁷⁷ The values of sharing that I envision cannot be readily captured by pricing. For example, a coffee klatch could be understood through the lens of consumption externalities. There are external benefits from drinking coffee in a group and conversing. But it would undermine many of the social functions of coffee klatches if the members had to pay each other for every *bon mot* or insight that was shared. The value of sharing that arises from cultural production stems largely from providing an alternative to the arms' length relationships of contemporary markets. A framework, such as that provided by consumption externalities, which reduces social relations

and Price Discrimination, 23 CARDOZO L. REV. 55, 132-40 (2001) (discussing the economic effects of sharing).

⁷⁶ See, e.g., HEILBRUN & GRAY, *supra* note 74, at 223-38 (discussing benefits from culture as externalities); William J. Baumol & W.G. Bowen, *On the Performing Arts: The Anatomy of Their Economic Problems*, 55 AM. ECON. REV. 495, 495-502 (1965) (presenting a seminal study in the economics of art and culture identifying external benefits arising from shared consumption).

⁷⁷ See CORNES & SANDLER, *supra* note 47, at 69-72 (discussing public goods as externalities); Arrow, *supra* note 47, at 67-81 (discussing externalities with market and non-market allocation).

to pricing relations, is not helpful for identifying the government role in cultural production.

The concept of network effects is closer to what I am describing, but is also inadequate. A network effect occurs when individual consumption is enhanced by others also consuming a particular product.⁷⁸ The concept is closely connected to a consumption externality, but permits consideration of consumption that occurs in groups. The problem with the concept of network effects is that much of the economic literature focuses on the technological basis for network effects.⁷⁹ The standard textbook example is that of the telephone. A telephone has value only if it is used by a network of individuals. As many have quipped, a single telephone is an elaborate paperweight; two users of telephones provide the start for a network. The concept of network effects is also applied to computer operating systems and computer networks. Although there is some mention of social networks, the economics literature seems largely, if not exclusively, focused on technological networks. Economic scholars who have looked at network effects socially have essentially resorted to the concept of consumption externality.⁸⁰

Attempts to understand the values of sharing through the concepts of externalities and network effects suffer from the same problems as public goods justifications for government provision of services. They assume a baseline of private, individual consumption mediated through a price system. The question, under this approach, ultimately becomes one of how to create a market for cultural products. But the more pertinent question of rights and obligations attendant to the market is ignored or assumed away. Sharing illustrates this problem. Coffee klatches, reading groups, singing groups, open source software, scholarship networks, listservs, online bulletin boards, and chat rooms are all ways in which expressive activity is consumed and shared. These institutions exist outside the sphere of the market and the government. Instead of reducing these institutions to market relationships, serious analysis requires understanding these institutions in relation-

⁷⁸ See Jacco Hakfoort, *Copyright in the Digital Age: The Economic Rationale Re-examined*, in COPYRIGHT IN THE CULTURAL INDUSTRIES 63, 70-74 (Ruth Towse ed., 2002) (discussing the benefits of network externalities on consumers).

⁷⁹ See STAN J. LIEBOWITZ & STEPHEN E. MARGOLIS, WINNERS, LOSERS & MICROSOFT: COMPETITION AND ANTITRUST IN HIGH TECHNOLOGY 87-89 (1999); OZ SHY, THE ECONOMICS OF NETWORK INDUSTRIES 1-6 (2001). For a discussion of technical standard networks in law, see Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 488-94 (1998).

⁸⁰ See, e.g., GARY S. BECKER & KEVIN M. MURPHY, SOCIAL ECONOMICS: MARKET BEHAVIOR IN A SOCIAL ENVIRONMENT 8-11 (2000).

ship to market and government alternatives.⁸¹ Recognizing the value of sharing highlights the importance of private associations in cultural production, and raises the question of the government function in protecting rights and obligations that make these private associations possible.⁸²

A simple answer to this question would be one of laissez-faire, fostering sharing through private associations. The First Amendment right of association, for example, promotes the creation of private groups within which the values of sharing can be realized.⁸³ But the government has an important role to play in facilitating a culture of sharing through the creation of cultural infrastructure. First, the government can establish cultural infrastructure through the creation of public spaces.⁸⁴ Public libraries are one example of such infrastructure. Creating a forum in television media, such as local access stations, is another example. Second, the government can create cultural inputs that benefit private associations. Examples of such inputs would include museums, which provide not only a public space, but also archive and preserve cultural products that are accessible to individuals and groups.⁸⁵ Finally, the government can aid in establishing rules that facilitate private associations.⁸⁶ For example, the promotion of bilingualism, or at least the toleration of bilingualism, can support certain associations, such as communication among ethnic groups

⁸¹ See sources cited *supra* note 48.

⁸² The concept here is akin to Professor Stewart Macaulay's notion of private government, organizations that are not affiliated with a formal state apparatus but "attempt to take over only some of the functions of public government and mimic only part of the public legal system." Stewart Macaulay, *Private Government*, in LAW AND THE SOCIAL SCIENCES 445, 447 (Leon Lipson & Stanton Wheeler eds., 1986). For a discussion of intellectual property rights in institutional economics terms, which implicitly recognizes the role of private associations, see Robert P. Merges, *Intellectual Property Rights and the New Institutional Economics*, 53 VAND. L. REV. 1857 (2000).

⁸³ See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 650 (2000) (finding that the right to association is "expressive activity" under First Amendment). For a critical perspective on rights of association, see Madhavi Sunder, Note, *Authorship and Autonomy as Rites of Exclusion: The Intellectual Property of Free Speech in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 49 STAN. L. REV. 143 (1996).

⁸⁴ See THROSBY, *supra* note 14, at 71 (discussing the creation of public libraries); Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1170 (1996) (discussing First Amendment rights in public places); Robert Wedgeworth, *Copyright and Libraries: Act II*, 17 COLUM.-VLA J.L. & ARTS 417, 420 (1993) (discussing copyright law and public libraries). The Supreme Court described the government's role in financing libraries in its recent decision upholding Congress's power to require libraries to filter content on the Internet. *United States v. Am. Library Ass'n*, 123 S. Ct. 2297, 2303 (2003).

⁸⁵ See HEILBRUN & GRAY, *supra* note 74, at 187-92 (discussing art museums); see also MILLER & YUDICE, *supra* note 19, at 147-62 (discussing public museums); O'HAGAN, *supra* note 41, at 164-66 (discussing the functions of museums); THROSBY, *supra* note 14, at 27 (discussing the cultural value of art).

⁸⁶ See PUTNAM, *supra* note 75, at 402-04 (prescribing the creation of social capital).

in the workplace or other fora.⁸⁷ The establishment of a poet laureate, albeit controversial, can also be instrumental in creating cultural products that can eventually be shared through intimate associations.⁸⁸

Needless to say, many of the government functions I have listed have been provided by markets. Libraries and museums have been privatized.⁸⁹ These trends, however, are illustrations of the privatization of government functions. My point here is that there is an economic argument in support of a government role in the production of culture.

2. *Summary of Economic Arguments*

In this section, I have examined the economic arguments for identifying government functions for cultural production that are grounded in the theory of public goods and have found them lacking. In their place, I have proposed an institutional analysis of the public goods problem that focuses on the question of rights and obligations of parties engaged in cultural production. This inquiry helped to identify two specific problems that are often subsumed under the theory of public goods: the fixed cost problem and the value of sharing. Focusing on these two problems aided in deriving through economic analysis two central government functions in cultural production: financing of the production of cultural activities and the creation of cultural infrastructure. Economic analysis is helpful in identifying these two efficiency-ended roles of government. But the theory of democratic governance offers a more comprehensive benchmark for gauging government functions that includes not only these two governmental roles, but other important ones based on non-efficiency ends.⁹⁰ The theory of democratic governance, developed in the next subsection, provides a replacement for the theory of public goods criticized above.

⁸⁷ See Jeffrey Church & Ian King, *Bilingualism and Network Externalities*, 26 CANADIAN J. ECON. 337 (1993) (presenting model that demonstrates impact of bilingualism on communication); Edward P. Lazear, *Culture and Language*, 107 J. POL. ECON. S95-S126, S124 (1999) (concluding that governmental programs can influence assimilation into communities); Madeline Zavodny, *The Effects of Official English Language Laws on Limited-English-Proficient Workers*, 18 J. LAB. ECON. 427 (2000).

⁸⁸ For a discussion of poet laureates, see Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73 (1996).

⁸⁹ THROSBY, *supra* note 14, at 146; Margaret J. Wyszomirski, *Philanthropy and Culture: Patterns, Context, and Change*, in PHILANTHROPY AND THE NONPROFIT SECTOR IN A CHANGING AMERICA, *supra* note 19, at 461-80 (discussing private funding of cultural institutions).

⁹⁰ See Paul Burrows, *Justice, Efficiency, and Copyright in Cultural Goods*, in CULTURAL ECONOMICS AND CULTURAL POLICIES 99-108 (Alan Peacock & Ilde Rizzo eds., 1994) (arguing that efficiency alone cannot foster creative talents).

B. The Theory of Democratic Governance and Cultural Production

Despite the prevalence of public goods theory in discussions of copyright and cultural production, the theory is inadequate first because it fails to analyze the set of entitlements that underlie markets and other institutions associated with copyright, and second, because it assumes a market institution as the benchmark for gauging cultural production. In this section, I argue that government's role in cultural production can better be understood from the benchmark of democratic governance, and specifically from the twin goals of participation and autonomy. The theory of democratic governance, by defining the primary set of entitlements and by proffering a broader baseline, addresses the two gaps in public goods theory. Furthermore, the theory of democratic governance can incorporate markets and some of the insights that can be gleaned from public goods theory regarding the problems of fixed costs and shared consumption.

Grounding copyright in a theory of democratic governance may seem inconsistent with copyright's history in censorship and the crown's control over the press, a history I discuss in Part II. Recognizing the intimate connections between the growth of copyright and the growth of democracy resolves this inconsistency. While it is true that prior to the eighteenth century, copyright existed as a printer's right rather than an author's rights, after the Statute of Anne, copyright was vested in the author and represented, in part, a triumph over the censorious power of the Stationer's Company, the printers' guild in England. This shift from printer's right to author's right heralded, in part, a democratic shift in culture and politics towards a regime of free expression.⁹¹ The debate over copyright in the early American republic, particularly Madison's statements about the public good, reflected the debate over the role of copyright in a democratic polity. Copyright debates in the nineteenth century were infused with questions of democratic values and representation, particularly as the freedoms of press and speech were implicated. Copyright's development in the twentieth century and current debates over copyright and developing countries are intimately connected to the establishment of accountable government institutions and reliable, independent media. Copyright theory has intimate links with broader theories of democratic governance.

⁹¹ See C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY 209-12 (2002) (discussing the shift in culture and politics toward a regime of free expression); Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217, 233-38 (1998) (analyzing Western-based copyright efforts on an international scale).

Some evidence for a democratic governance theory of copyright can be found in discussions of copyright and the police power. Although Madison was not speaking in terms of the police power, his reference to the public good in his support of copyright indicates the importance of copyright law in promoting the public welfare.⁹² William Novak's study of the police power and the people's welfare does not mention copyright, but his various descriptions of government's role in creating a well-regulated society provide a basis to build a case in support of copyright's ability to promote the public good.⁹³ For example, Novak cites a 1722 treatise on the police power by Nicolas Delamare that lists, among the categories of police regulation and administration, the sciences and the liberal arts, and manufactures and the mechanical arts.⁹⁴ According to Novak, Nathaniel Chipman, in his 1833 treatise on government, included the facilitation of the diffusion of useful knowledge as part of the *salus populi*.⁹⁵ Furthermore, Novak points to the importance of the creation of communication networks by the government in the promotion of a well-regulated economy.⁹⁶ These examples support the government's role in cultural production as part of its police power. To the extent copyright law regulates science, the liberal arts, and the establishment of communication networks such as newspapers, books, and libraries, the law fulfills a public purpose.

But the case for the public purpose of copyright is not unequivocal. Ernest Freund's treatise on the police power in the nineteenth century United States discusses copyright in the section on monopoly and special privileges.⁹⁷ This categorization suggests that copyright does not fit neatly into the government's goal of furthering public welfare. Freund divides government activities into the three spheres: (1) safety, order and morals; (2) proper production, distribution and wealth; and (3) moral, intellectual and political movements.⁹⁸ According to Freund, the first sphere is conceded to the state, the second category is doubtful as an object of the police power, and the third is exempted from the police

⁹² See Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 84 J. PAT. & TRADEMARK OFF. SOC'Y 909, 923-26 (2002) (discussing Madison's comments on copyright and patent in *The Federalist Papers*).

⁹³ WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 9-17 (1996).

⁹⁴ *Id.* at 14.

⁹⁵ *Id.* at 49.

⁹⁶ See *id.* at 115-21 (arguing that government control over roads, parks, and rivers secured a means of public communication).

⁹⁷ ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* 686-88 (1904).

⁹⁸ *Id.* at 11.

power.⁹⁹ To the extent that copyright is an economic activity fitting into the second sphere, or a type of intellectual movement fitting into the third, the case for copyright law as an exercise of the police power is weakened. Freund's discussion of copyright as a common law right also weakens the case, although he recognized that both U.S. and British jurists had rejected the common law basis of copyright.¹⁰⁰ The case, however, is strengthened when Freund mentions at the end of his discussion of copyright that the monopoly privilege of copyright (and patent) are granted with "a duty to exercise the privilege for the public benefit."¹⁰¹ Although he refers to this duty as a creature of foreign systems of law, he does mention one example from the United States where this duty was exercised.¹⁰²

The equivocal basis for copyright in the police power can be explained by the lack of a strong theory of the government's role in cultural production and the importance of this role to the formation of democratic institutions.¹⁰³ Where public goods theory fails to aid us in understanding the legal entitlements underlying copyright, the theory of democratic governance grounds copyright and

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 686.

¹⁰¹ *Id.* at 687.

¹⁰² *Id.* at 688 (discussing New York's copyright statute that imposed price controls on books).

¹⁰³ There are a few exceptions to this statement. Alexis de Tocqueville briefly commented on the relationship between democracy and the fine arts, noting "[a]ristocracies produce a few great pictures, democracies a multiple of little ones." ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 468 (George Lawrence trans., 1969). According to Sheldon Wolin, Tocqueville found in America "a democracy with strong traditions of learning and an unsatisfied appetite for knowledge." SHELDON S. WOLIN, *TOCQUEVILLE BETWEEN TWO WORLDS: THE MAKING OF A POLITICAL AND THEORETICAL LIFE* 358 (2001). For another exception, see JOHN DEWEY, *DEMOCRACY AND EDUCATION* 121-23 (1916). Dewey's focus, however, seems primarily to be on education, one facet of what I am referring to here as cultural production. Henry Gans expresses skepticism about the ability of the arts to enhance democracy but sees a role for democracy to inform the arts. See Herbert J. Gans, *Democracy and the Arts: Adversary or Ally?*, in *THE ARTS IN A DEMOCRATIC SOCIETY* 114-17 (Dennis Alan Mann ed., 1977). For another example of the ambiguous relationship between culture and democracy, see Anthony T. Kronman, *Is Poetry Undemocratic?*, 16 GA. ST. U. L. REV. 311, 314-35 (1999) (commenting on the conflicting aristocratic tendencies and democratic possibilities of poetry). For an important discussion of the relationships among democracy, technology, and the creation of "communicative and cultural systems," see RICHARD E. SCLOVE, *DEMOCRACY AND TECHNOLOGY* 15-16 (1995). For a general discussion of the interrelationship of democracy and the arts, see Dennis Alan Mann, *Introduction to THE ARTS IN A DEMOCRATIC SOCIETY*, *supra*, at 13-15. The best literary defense for the relationships among democracy, the arts, and culture is provided by Walt Whitman. See DAVID S. REYNOLDS, *WALT WHITMAN'S AMERICA: A CULTURAL BIOGRAPHY* 474-84 (1995) (discussing Whitman's work on the poem "Democratic Vistas"). Public monuments, particularly those to controversial subjects, provide an excellent example of the relationship between the state and public art. See SANFORD LEVINSON, *WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES* 35-38 (1998) ("[M]onuments or even street names and the like . . . are thought to play some role in inculcating particular understandings of society within future generations.").

cultural production in the twin values of *autonomy*¹⁰⁴ and *participation*.¹⁰⁵ Autonomy, or respect for individual liberty, is often recognized as the keystone of democracy, and its value in copyright and cultural production is manifested in the values of self-expression and creativity.¹⁰⁶ While often associated with artistic expression or entertainment, self-expression and creativity are equally critical to political expression and innovation. Political treatises, news reporting, and fact gathering depend upon the ability of the creator of these types of information to be free to research and express opinions and ideas just as much as the creator of a song, novel, or poem.¹⁰⁷

Autonomy alone is meaningless unless expression has some audience, and therefore must be understood in conjunction with participation. At a minimum, the value of participation requires that individuals be allowed to communicate their expression to others.¹⁰⁸ While there is arguably no obligation that a targeted audience listen or respond, the autonomy accorded to the creation of expression, whether artistic or political, is meaningless unless the expression can be shared with others.¹⁰⁹ Consequently, democratic governance requires that institutions facilitate participation by not

¹⁰⁴ See ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 138-39 (1989) (discussing self-determination in collective decisions); ROBERT A. DAHL, *ON DEMOCRACY* 53-54 (1998) (discussing self-determination in the decision-making process); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 15-16, 24-27, 39 (1948) (discussing limits on free men and free speech); ADAM D. MOORE, *INTELLECTUAL PROPERTY & INFORMATION CONTROL: PHILOSOPHIC FOUNDATIONS AND CONTEMPORARY ISSUES* 107-08 (2001) (suggesting that sovereignty and autonomy underlie justification for possession through laboring on an object); Robert Bechtold Heilman, *Democracy and the Arts*, in *ASPECTS OF DEMOCRACY* 97, 97-98 (Robert Bechtold Heilman ed., 1941) (discussing art as form of self-expression in a democracy); Arthur M. Melzer et al., *Introduction to DEMOCRACY AND THE ARTS* I, 2 (Arthur M. Melzer et al. eds., 1999) (noting individual liberty is a traditional issue in politics and art); Steven Wall, *Radical Democracy, Personal Freedom, and the Transformative Potential of Politics*, in *DEMOCRACY* 225, 248-53 (Ellen Frankel Paul et al. eds., 2000) (discussing discursive autonomy in democratic politics).

¹⁰⁵ See BAKER, *supra* note 91, at 129-53 (describing different forms of participatory democracies); TERRI LYNN CORNWELL, *DEMOCRACY AND THE ARTS: THE ROLE OF PARTICIPATION* 49-82 (1990) (asserting that artistic endeavors help individuals participate in the political process); DAHL, *DEMOCRACY AND ITS CRITICS*, *supra* note 104, at 228-29.

¹⁰⁶ See MEIKLEJOHN, *supra* note 104, at 39; T. Scanlon, *A Theory of Freedom of Expression*, in *THE PHILOSOPHY OF LAW* 154-55 (R.M. Dworkin ed., 1977) (recognizing free speech as a form of expression); Wall, *supra* note 104, at 229 (asserting that self-expression changes and refines one's own interests).

¹⁰⁷ See BAKER, *supra* note 91, at 154-58 (arguing for the intrinsic benefit of knowledge); PHILIP KITCHER, *SCIENCE, TRUTH, AND DEMOCRACY* 147-66 (2001) (discussing the utility of disseminating subversive truths); MEIKLEJOHN, *supra* note 104, at 15-16 (presenting the fundamentals of free speech).

¹⁰⁸ See DAHL, *DEMOCRACY AND ITS CRITICS*, *supra* note 104, at 339 (arguing that facilitating participation through discussions is one good of suggested innovations); DAHL, *ON DEMOCRACY*, *supra* note 104, at 37.

¹⁰⁹ See MEIKLEJOHN, *supra* note 104, at 24-27 (arguing that effective self-government requires free speech).

unduly excluding voices from different fora or by imposing disparate burdens based on perspective.¹¹⁰ Needless to say, the values of autonomy and participation may come into conflict. For example, in concentrated media markets, the right to participate may be diluted by the rights of media owners to control their outlets.¹¹¹ In copyright law, the tension often appears as one between the rights of copyright owners and the rights of copyright users, such as in cases involving parodies, news reporting, or critical works.¹¹² In each of these cases, the autonomy of the copyright owner is pitted against the autonomy of the user and her right to participate in the relevant community of expression.

Having identified the values of autonomy and participation, the next question for the theory of democratic governance is how to give effect to these values in the structuring of institutions. Public goods theory, as pointed out above, assesses the validity of institutions in terms of their ability to resolve market failures. Democratic governance theory, in contrast, sees the market as only one of a set of institutions through which the values of autonomy and participation can be realized.¹¹³ Markets certainly are not unimportant, but the efficacy of markets is to be measured with respect to other institutions, such as private associations and non-profit entities. In the case of sharing, discussed above, I gave several examples of these non-market institutions: coffee klatches, museums, libraries, and universities. The problem posed for democratic governance theory is to create the set of institutions that are grounded in the values of autonomy and participation.

The government's role in creating the requisite institutions for democratic governance is instrumental in defining government functions. To the extent that markets are among these institutions, the government functions of financing cultural production and facilitating sharing, both discussed above, are relevant here. Also relevant, particularly for non-market institutions, are three other government functions necessary for cultural production: (1) the creation of public fora for participation, (2) the development of cultural infrastructure to facilitate autonomy and participation, and

¹¹⁰ See CORNWELL, *supra* note 105, at 165-85 (recognizing the value of art in fostering participatory democracy).

¹¹¹ See BAKER, *supra* note 91, at 155-56 (discussing the effect of monopolies on news reporting).

¹¹² See *id.* at 66-67.

¹¹³ See DAHL, DEMOCRACY AND ITS CRITICS, *supra* note 104, at 220-22; DAHL, ON DEMOCRACY, *supra* note 104, at 167-69 (discussing democracy in a non-market economy); CHARLES E. LINDBLOM, THE MARKET SYSTEM: WHAT IT IS, HOW IT WORKS, AND WHAT TO MAKE OF IT 226-32 (2001) (discussing whether a market system is necessary for democracy).

(3) the creation of open systems that permit transparency and access to cultural artifacts.

My arguments for the government's role in the creation of public fora are different from my arguments about facilitating sharing made above. In the previous context, my focus was on recognizing the economic efficiency of certain transactions that would be ignored by the market. The creation of public fora has non-economic values as well, such as providing venues for participation and the exercise of creative pursuits.¹¹⁴ I have several things in mind here. First, at the level of local government, public fora can be created by shared spaces, such as sidewalks and parks, in which open speech with minimal regulation is permitted.¹¹⁵ At the national level, the creation of public fora would be facilitated through regulation of media such as newspapers, television, radio, and, with the expansions of the Internet, telephony.¹¹⁶ First Amendment law also plays a key role in the creation of public fora through protections for certain types of speech,¹¹⁷ protections for certain speakers,¹¹⁸ and, most relevantly, protection for speech in certain places.¹¹⁹

The government provision of cultural infrastructure occurs in many ways, from income distribution programs that support the arts to the creation of institutions for the collection of cultural artifacts. The Work Projects Administration ("WPA") provides a unique example of the government's efforts to promote cultural production in order to redistribute income.¹²⁰ Under the WPA, unemployed authors and mathematicians were hired to produce important cultural works, including tables of logarithms, tables of

¹¹⁴ See ANTHONY G. WILHELM, *DEMOCRACY IN THE DIGITAL AGE: CHALLENGES TO POLITICAL LIFE IN CYBERSPACE* 14-15 (2000) (advocating the need for a public sphere for democratic politics); Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439, 488-94 (2003) (recognizing public parks and streets as a forum for expression and exchange of ideas); Carroll William Westfall, *Architecture and Democracy, Democracy and Architecture*, in *DEMOCRACY AND THE ARTS*, *supra* note 104, at 73, 85-86.

¹¹⁵ See LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 19-23 (2001); Hunter, *supra* note 114, at 488-90.

¹¹⁶ See BAKER, *supra* note 91, at 288-95 (discussing context regulation of media); LESSIG, *supra* note 115, at 23-25 (describing these media as examples of commons).

¹¹⁷ See, e.g., *Spence v. Washington*, 418 U.S. 405 (1974) (providing an example of when "conduct" constitutes "expression").

¹¹⁸ See, e.g., *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (providing an example of the protection of government employees' right to speak).

¹¹⁹ See, e.g., *Marsh v. Alabama*, 326 U.S. 501 (1946) (providing an example of distinguishing private and public fora).

¹²⁰ For a discussion of the redistributive goals of cultural production, see HEILBRUN & GRAY, *supra* note 74, at 240-41; THROSBY, *supra* note 14, at 54, 155. For a good discussion of WPA artistic projects and their lack of copyright protection, see Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 513 n.109 (1999).

integrals, and what has been as described as exemplars of premier regional writing – the WPA Guides to various states, documents that recorded the history and culture of all the fifty states.¹²¹ While these projects could be seen as “make work” efforts in order to move the United States out of the Great Depression, the government’s involvement in creating important cultural artifacts should not be overlooked. The projects allowed unemployed authors to create works that would otherwise not have existed.

The goal of providing cultural infrastructure is also facilitated by government involvement in preserving minority cultures, such as through statutes like the Native American Grave Repatriation Act and policies to repatriate or preserve cultural artifacts.¹²² These preservationist goals are important to democratic culture in many ways. They permit the preservation and archiving of a national history that establishes an identity for citizens and a common reference point for deliberation and discussion over national issues.¹²³ For example, museum exhibits about the Japanese internment, or museums that record atrocities against Native Americans, serve as a reminder of the abuse of private and state power that can temper arguments about how to deal with minority populations in times of renewed racial and ethnic conflict.¹²⁴ Furthermore, democratic governments have an obligation to ensure that minority populations are protected from the exercise of abuse by majorities.¹²⁵ By supporting minority cultural production, democratic governments promote inclusiveness and allow for many interests to be voiced in the marketplace and other public fora. The point should be made that much of what I describe can take place, and in fact has taken place, through private associations. For example, the Holocaust Museum in Washington, D.C., and the Civil Rights Museums in Memphis and Birmingham were built with a mix of government and private funds.¹²⁶ These three

¹²¹ See, e.g., THE WPA GUIDE TO NEW YORK CITY (Fed. Writer’s Project of the Works Progress Admin. in N.Y. City ed., 1992); THE WPA GUIDE TO 1930S OKLAHOMA (Fed. Writer’s Project of the Works Progress Admin. in the State of Okla. ed., 1986).

¹²² JOSEPH SAX, PLAYING DARTS WITH A REMBRANDT 182-84 (1999).

¹²³ *Id.* at 197 (drawing attention to the ownership problems associated with artifacts and antiquities). For a critical perspective on this point, see Robert Brustein, *Democracy and Culture*, in DEMOCRACY AND THE ARTS, *supra* note 104, at 11, 19-21 (arguing that the emphasis on culture ignores or supplants movements for political voice and representation).

¹²⁴ THROSBY, *supra* note 14, at 65, 125; see also O’HAGAN, *supra* note 41, at 53.

¹²⁵ See, e.g., A. B. Yehoshua, *Modern Democracy and the Novel*, in DEMOCRACY AND THE ARTS, *supra* note 104, at 42, 53-54 (arguing for the need for minority artists to challenge and expand the literary canon); SAX, *supra* note 122, at 182-84 (discussing cultural heritage law).

¹²⁶ See Mission Statement, United States Memorial Holocaust Museum, at <http://www.ushmm.org/museum/council> (last visited Nov. 12, 2003) (describing the history of museum); History of the Museum, National Civil Rights Museum, at <http://www.civilrightsmuseum.org/about/history.asp> (last visited Nov. 12, 2003) (describing the

examples further support the argument that the government has played an important role in cultural production, developing a cultural infrastructure which protects the participation and autonomy values of members of minority cultures.

Finally, according to the theory of democratic governance, government can pursue the values of participation and autonomy by carrying out its function of creating open systems that facilitate transparency and access.¹²⁷ This function entails more than creating public fora. Understanding this function requires understanding the term *cultural artifact* broadly. My examples of cultural artifacts have included items in museums, literary works, music, and other creations of the human mind, such as the WPA regional guides. Other examples of cultural artifacts would include legal rules (whether judicial opinions or code), the products of university research (whether in the humanities or in the sciences), textbooks, population data, and other types of information. To include the creation of these items as cultural production serves two purposes. First, some of these items are primary cultural materials that are necessary for the operation of the other two government functions.¹²⁸ For example, the Native American Grave Repatriation Act carries out the government function of creating cultural infrastructure. If the underlying law is inaccessible to the groups and interests that it is trying to protect, then the goal of creating cultural infrastructure is undermined. Second, these items of cultural production are themselves important cultural records that can inform the creation of cultural artifacts.¹²⁹ Records of population movements and historical records of seemingly banal items like shipping manifests can serve as the basis for creation of cultural products, as any student or practitioner of history or historical fiction would attest. Open systems of recording and preserving information are important ends for the government under the theory of democratic governance.¹³⁰

history and funding for the museum).

¹²⁷ See, e.g., BAKER, *supra* note 91, at 201-02 (discussing access rights); DAHL, ON DEMOCRACY, *supra* note 104, at 38 (discussing agenda control); KITCHER, *supra* note 107, at 118-19 (discussing agenda setting in the context of the search for truth).

¹²⁸ See, e.g., Christopher W. Morris, *The Very Idea of Popular Sovereignty: "We The People" Reconsidered*, in DEMOCRACY, *supra* note 104, at 1, 3 (describing law as "action guiding").

¹²⁹ See, e.g., SAX, *supra* note 122, at 173 (describing cultural artifacts as intermediate works used as inputs to create final works).

¹³⁰ See JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 38-45 (discussing and critiquing the development of the cadastral system for mapping and land recording). Professor Scott has a very pessimistic take on government's involvement in creating systems of recording, characterizing them as means of social control. For a more optimistic perspective, see HERNANDO DE SOTO, THE MYSTERY OF

In conclusion, the theory of democratic governance provides an alternative to the theory of public goods by incorporating some of the ideas from public goods theory and filling in its gaps. The theory identifies two principal legal entitlements – autonomy in expression and creativity, and participation – and derives several government functions necessary for creating institutions that protect these two entitlements. Since these institutions include markets, the functions of financing cultural production and creating cultural infrastructure to promote sharing are implicit in the theory of democratic governance. In addition to these two functions, the theory aids in identifying three other functions: (1) the creation of public fora, (2) the creation of cultural infrastructure to promote autonomy and participation by minority cultures, and (3) the creation of open systems. Having identified the functions of government for cultural production, I now turn to explaining how copyright can be understood as a privatization of these functions.

C. Copyright and the Mechanisms of Privatization

My working definition of privatization is the delegation of governmental decision making to a non-governmental entity. I have shown, based upon my criticism of the economic theory of public goods and the development of a theory of democratic governance, that there are five roles that government decision making plays in cultural production: (1) the financing of cultural production, (2) the creation of cultural infrastructure for sharing, (3) the creation of public fora, (4) the creation of cultural infrastructure that protects minority cultures, and (5) the creation of open systems. In this subsection, I show how the government delegates the execution of these functions to non-governmental entities through the creation of copyright.

1. Privatization of Cultural Production Through Copyright

Privatization typically occurs in one of two ways. The first is by contracting out with a private party for the provision of a historically governmental service.¹³¹ The second means of privatization is private financing of government activities through charitable donations and funding by private associations such as churches

CAPITAL: WHY CAPITALISM TRIUMPHED IN THE WEST AND FAILS EVERYWHERE ELSE 46-47 (2000) (explaining the importance of recording and other systems of preserving title for the development of markets). For a philosophical treatment of these issues, see JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 1-30 (1995) (discussing symbolic and referential systems as the building blocks of social reality and the starting point for the creation of institutional facts).

¹³¹ See Moore, *supra* note 43, at 1213-14.

or non-profit entities. The second means is considered more radical than the first because the government in many instances cedes control over a program to a private association, and the government loses the power to regulate an activity through the power of the purse.¹³² Under contracting, the government can in most instances retain control of the activity through the terms of the contract.¹³³ As a matter of fact, however, most government contracts cede much control to private entities, such as with the private management of prisons, and thus privatization through contract may be just as troubling as privatization through voluntary donations.¹³⁴

In the area of cultural production, the government has devolved its role both through contract and through reliance on voluntary donations. In some countries, museum management is privately governed.¹³⁵ Funding for the arts has shifted from government grants and subsidies to the donations and activities of private benefactors.¹³⁶ Greater reliance is placed on private associations to generate interest in cultural activities and to generate non-government financing.¹³⁷ Within this broad scheme of devolution can be found copyright, which combines elements of contracting out and voluntary financing. By creating a private right in the output of cultural production, copyright allows the government to devolve both the production and financing of cultural activities to private parties through private negotiations.

Copyright law can be recognized as a form of private financing of cultural production. Although privatization through financing has often entailed reliance on private voluntary donations as a substitute for taxation, it should not be ignored that one of the chief goals of the creation of a property right through copyright is allowing the copyright owner to market her work and extract the available rents from exclusivity. The size of these rents will vary

¹³² See *id.* at 1215-16 (explaining the difference between privatizing production and privatizing financing).

¹³³ *Id.* at 1214.

¹³⁴ See MINOW, *supra* note 20, at 137 (explaining the constitutional limits of privatizing government roles via contract).

¹³⁵ See HEILBRUN & GRAY, *supra* note 74, at 200-02 (explaining the difficulties faced by museums in selling off certain art in order to afford new acquisitions); THROSBY, *supra* note 14, at 146 (describing the privatization of the arts in European and formerly communist countries).

¹³⁶ Peter S. Johnson, *Museums*, in A HANDBOOK OF CULTURAL ECONOMICS, *supra* note 42, at 315, 318-19.

¹³⁷ See MILLER & YUDICE, *supra* note 19, at 68-69; THROSBY, *supra* note 14, at 145-46; Volker Kirchberg, *Corporate Arts Sponsorship*, in A HANDBOOK OF CULTURAL ECONOMICS, *supra* note 42, at 143, 143-45; Michihiro Watanabe, *Background and Cultural Policies and Programs in Japan*, in COMPARING CULTURAL POLICY: A STUDY OF JAPAN AND THE U.S., *supra* note 42, at 61, 88-90.

depending upon the market for the work, but exclusivity permits the distribution of the work through the marketplace and the accumulation of rents that can finance investments in cultural activities. Although rents are retained by the copyright owner, rather than donated to a public cause, the rents earned by the copyright owner functionally serve as a substitute for government grants and other subsidies financed by tax revenues. In this regard, one needs to remember Prime Minister MacCauley's famous description of copyright law as a tax on readers to benefit authors.¹³⁸ To the extent that the copyright tax finances the ability of authors to produce cultural artifacts, copyright law substitutes for a governmental function.

Copyright law, however, does not fit as neatly into the model of privatization by contracting. First of all, by the grant of a copyright, the government is not contracting for the production of a service or product. Expression that is copyrightable may already be produced, or would have been produced, absent any prodding from the government. In a loose sense, however, copyright law does create a quid pro quo that can be analogized to a contract. The exclusivity given by copyright is exchanged for the publication of the work and eventual dedication to the public domain after the term expires.¹³⁹ But this quid pro quo is different from the government contracting with a private entity to manage prisons or provide welfare services. The crucial distinction is the underlying rights of the author implicated by copyright. The copyright owner's rights are vested in a way that the rights of private parties to government contracts are not. In the prison management context, the government is granting a contract right; in the copyright context, the government is granting a property right. The key difference between the two rights has to do with the scope of the grant from the government. In the prison case, the contract right creates claims only against the government. In the case of copyright, the property right creates claims against the whole world. This claim allows the copyright owner to more efficiently exercise his market exclusivity to generate rents to finance cultural production.

¹³⁸ THOMAS BABINGTON MACAULEY, *SPEECHES ON POLITICS AND LITERATURE* 176-89 (1841).

¹³⁹ See Pamela Samuelson, *Toward a "New Deal" for Copyright in the Information Age*, 100 MICH. L. REV. 1488, 1496 n.34 (2002); see also Thomas B. Nachbar, *Constructing Copyright's Mythology*, 6 GREEN BAG 2D. 37, 40-41 (2002) (explaining the quid pro quo of copyrights and their tradition). For a good example of this quid pro quo, consider a bill recently introduced by Representative Martin Olav Sabo (D-Minn.) requiring certain works resulting from scientific research to be excluded from copyright if the research was substantially funded by the federal government. See Public Access to Science Act, H.R. 2613, 108th Cong. (2003).

The distinction between contract rights and property rights¹⁴⁰ does make a difference for assessing the benefits and costs of privatization.¹⁴¹ By granting contract rights to a private party, the government retains some control over the activity, at least in theory, through specifying the terms of the contract and forcing renegotiation. To the extent that privatization can be quantified, the granting of property rights to private parties entails a greater devolution of government power than the granting of contract rights. More importantly, a comparison of property and contract as tools of privatization should consider the government function being devolved into private hands. In the case of prisons, the government is devolving in part its function to punish violators of the law to a private party. The general enforcement of criminal laws through the court system is still under the government's control. The difficulty with privatizing prisons is that the government also has a role in protecting the rights of prisoners and ensuring that the terms of their incarceration are not cruel and unusual. The fear is that this government function is being ignored and devalued through the privatization of prisons unless the government monitors the administrator of prisons through contract. In the case of cultural production, the government's function is to allocate fixed costs appropriately, build cultural infrastructure, and pursue redistributive goals. The devolution of these functions through property results in the government losing control over the financing of cultural products, the creation of cultural infrastructure, and the protection of minority cultures.

The differences between privatization through contract and privatization through the grant of a property right illustrate what is at stake in the privatization debate more broadly. Privatization changes the institutional structure through which decisions are made, and influences the values that are represented and rewarded. If the government produced cultural works directly, or funded their production through general tax revenue, then the types of cultural works that are produced becomes a function of a polity's form of government.¹⁴² Totalitarian governments produce one type of culture; democratic governments yet another. To the extent that a government aggregates or shapes the preferences of its citizens, government involvement in cultural production represents the

¹⁴⁰ See Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 789-97 (2001) (providing a functional basis for distinguishing between property and contract based on information costs).

¹⁴¹ See Moore, *supra* note 43, at 1225-28 (assessing various means of privatization).

¹⁴² Cf. THROSBY, *supra* note 14, at 132-33 (arguing that cultural objects and value should be weighed in trade negotiations).

preferences of its citizens broadly. Privatization makes cultural production an individual decision.¹⁴³ Copyright law per se does not discriminate among expressions based upon viewpoints. Artistic works with Christian themes have as much protection as artistic works with Buddhist themes. But copyright law does relegate the production and distribution of works to the marketplace and reduces the process of cultural production to a matter of private, market choices. The point is to recognize how privatizing cultural production through the creation of a property rights shapes the manner in which decisions about cultural production occur.

2. Responses to Potential Criticisms

There are two potential criticisms of my argument that copyright can be viewed as an example of privatization. First, theorists of privatization have not spoken about copyright. Their focus has been on areas that have traditionally been seen as governmental, such as law enforcement, education, and income redistribution policy. Copyright, as I have argued, has been viewed as a private right, and cultural production is often seen as a private activity – the product of individual creativity or of private associations. Of course, this assumption assumes away the role of the government in cultural production, particularly the functions of financing the arts, creating cultural infrastructure, creating public fora, protecting minority voice, and creating open systems. The absence of copyright from the privatization discussion does not reflect the irrelevance of my thesis, but more likely reflects assumptions about copyright as a private right and cultural production as a purely private activity.

Professor C. Edwin Baker's scholarship has partly filled the void.¹⁴⁴ His writings on the media, copyright, and democracy present a useful discussion of copyright's importance in preserving democracy in increasingly concentrated media markets. His work also demonstrates how copyright has led to market concentration.¹⁴⁵ While Professor Baker engages public goods theory, what the privatization thesis adds is a conceptualization of how copyright fits into the government's role in cultural production, whether through newspapers, television, book publishing, music, or the fine

¹⁴³ See Minow, *supra* note 27, at 1246-48 (raising concerns that privatizing social services may dilute public values and bypass constitutional protections); Moore, *supra* note 43, at 1216 (explaining that privatization is the individualization of value judgments); see also Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422, 1424-30 (2003) (concerning the pursuit of profits).

¹⁴⁴ See, e.g., BAKER, *supra* note 91.

¹⁴⁵ *Id.* at 15-19.

arts.¹⁴⁶ In other words, the story of copyright and democracy is not solely about the media.¹⁴⁷ It is about the relationships among government, democracy, and cultural creation.

The privatization thesis is also controversial because copyright scholars have always talked about public values in copyright without mention of privatization.¹⁴⁸ In other words, since public values in copyright have been defended without the privatization thesis, the question is what value does the privatization thesis add? The privatization thesis, I contend, offers a degree of coherence that may be missing from other public interest theories of copyright. The thesis recognizes the intimate relationship between the government and individuals that can be traced back to the crown's relationship with the printers' and booksellers' guilds, and continues on with the instrumental view of copyright in the early American republic, and today in international copyright. By recognizing the intimate relationship between public and private, the thesis would protect public values not by simply turning off private rights, but by regulating and restricting private control over copyrighted materials. In short, under the thesis I have developed, copyright's status as an individual right is replaced with copyright's role as an instrument to facilitate the creation and dissemination of private creative output to the public.

The thesis also supports an economic and utilitarian theory of copyright. Much of the scholarly discussion of copyright has centered on defending either a Lockean theory or a personality theory of copyright.¹⁴⁹ Both theories assume that copyright is a private right. Neither theory, however, provides much basis for protecting public values or answering questions such as how long copyright duration should be, and what are the appropriate parameters of fair use. Appeal has been made to John Locke's admonition that property can be made private only to the extent that the commons is left "enough and as good" as before the appropriation.¹⁵⁰ Such lan-

¹⁴⁶ *Id.* at 189-90.

¹⁴⁷ See RONALD V. BETTIG, *COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY* 33-78 (1996) (discussing the control of culture and information through media).

¹⁴⁸ See, e.g., James Boyle, *The Opposite of Property*, 66 *LAW & CONTEMP. PROBS.* 1, 1-3 (2003) (arguing that the public domain is often neglected in intellectual property scholarship); Boyle, *supra* note 6, at 34 (tracing the history of English privatization of common land).

¹⁴⁹ See Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *YALE L.J.* 1533, 1556-57 (1993) (describing Lockean theory); Justin Hughes, *The Philosophy of Intellectual Property*, 77 *GEO. L.J.* 287, 296, 230 (1988) (characterizing both Lockean and personality theory).

¹⁵⁰ JOHN LOCKE, *The Second Treatise of Government*, in *POLITICAL WRITINGS OF JOHN LOCKE* 261, 274 (David Wootton ed., 1993). For an application to copyright, see also Alan L. Durham, *The Random Muse: Authorship and Indeterminacy*, 44 *WM. & MARY L. REV.* 569, 570

guage strongly implies that there are limits to private appropriation, but the language is too general to aid in defining what those limits are. Similarly, personality theories lack precision in confining the scope of private rights under copyright. While personality theories would support some limit on the commodification of creations through copyright law, it is not clear what those limits would be. Seemingly, a personality theory would support a strong moral rights view of copyright at the expense of values of public access.¹⁵¹ The privatization thesis aids in identifying the specific functions copyright achieves and frames copyright within an economic, utilitarian framework that accommodates the market, the government, private rights, and public values.

The sharpest criticism of economic, utilitarian approaches is one of naiveté. Economic theories, it is argued, justify the status quo with a bias towards laissez-faire. Utilitarian theories, it is said, permit the abrogation of private rights in the pursuit of public welfare through what could be described as totalitarianism. But the privatization thesis (and the privatization debate more broadly) illustrates the complexity of economic and utilitarian arguments. Theorists of privatization acknowledge an intimate relationship between the public and the private. As Professor Minow states, privatization makes the state and the market partners.¹⁵² That partnership may be pernicious, or that partnership may be beneficial. The challenge for legal theorists and policy makers is to structure the terms of that partnership. This challenge is a matter of balance, a matter of recognizing the need for government and for markets, and cautions against laissez-faire or totalitarian positions. The privatization thesis, to return to Madison, emphasizes the coincidence between the public good and private claims.

D. Summary

This section has developed an understanding of copyright based on the theory of privatization. I am not suggesting that the privatization thesis is the sole explanation for copyright. I am not even suggesting that it is necessarily the best. But it is a thesis that recognizes the dual public and private dimensions of copyright, and it respects copyright's complex history and acknowledges

(2002); Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 413 (2002) (discussing term extensions to the copyright laws).

¹⁵¹ See, e.g., Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century*, 2001 U. ILL. L. REV. 151, 152-54 (applying a moral rights perspective to the copyright protection of a constructed persona).

¹⁵² See MINOW, *supra* note 20, at 3 (describing the partnership created by privatization).

copyright's current crisis. The strength of this thesis rests on how well it aids in introducing public values into the copyright debate and how well it serves in understanding copyright law. I turn to specific applications from copyright history and copyright doctrine in the next two sections.

II. PRIVATIZATION AND COPYRIGHT HISTORY

I have made the case for conceptualizing copyright as a form of privatization in theoretical terms. But, does the theory fit the historical facts? One potential objection to my theory is that copyright law protects a private right in activity that would occur absent the government. For Blackstone, the identity of a literary composition, and the attendant rights to prevent others from conveying or transferring the work, rested entirely in the sentiment and the language in the work.¹⁵³ Adam Smith referred to copyright as a "real right" that can be injured through unauthorized copying and distribution.¹⁵⁴ Conceptually, the argument would go, since creation is a private activity, copyright protects private rights that exist prior to the state.

This characterization of copyright, however, ignores the government's role in cultural production, and fails to recognize how copyright historically has been used to further governmental interests. Blackstone speaks of copyright not only as an individual right, but also as one arising from the sovereign's prerogative.¹⁵⁵ Smith, while recognizing the injuries that can emerge from unauthorized copying, clearly stated that copyright was not a natural right and was necessary as a monopoly privilege to reward creative production.¹⁵⁶ The historical evidence I present here illustrates that copyright has never been a purely private right. Copyright debates, from the inception of copyright in early English history to the political and legal battles over international copyright in the United States, have always pitted private rights and interests against public values. Therefore, the record does not support copyright's status as a purely private right secured by the government.

¹⁵³ 2 WILLIAM BLACKSTONE, COMMENTARIES *406.

¹⁵⁴ ADAM SMITH, LECTURES ON JURISPRUDENCE 11 (R.L. Meek et al. eds., Oxford Univ. Press 1978) (1762).

¹⁵⁵ See BLACKSTONE, *supra* note 153, at *410 (explaining the king's copyright prerogative).

¹⁵⁶ See SMITH, *supra* note 154, at 82-83. Smith also conceived of copyright in narrow terms as the right to first publish, a notion often attributed to Justice Stephen Breyer. See Stephen Breyer, *The Uneasy Case for Copyright*, *supra* note 33, at 298-300 (proposing lead time advantage as adequate incentive for the creation of new works).

A. *Copyright, the Censorial Power of the Crown, and the
Creation of a Literary Marketplace*

Copyright's origins in British history are well-recorded and analyzed.¹⁵⁷ The organization of publishing in the fifteenth century rested on a grant of a printing privilege by the crown, a privilege that had its origins in Venice.¹⁵⁸ Owners of printing presses were given exclusive rights to publish certain materials deemed as having their source in the sovereign.¹⁵⁹ Individual authors would also have their works published through private negotiation with a publisher. In England, the publishers and booksellers were organized in a guild called the Stationer's Company, which was established in 1557 by royal prerogative.¹⁶⁰ Members of the Stationer's Company would negotiate with individual authors for the right to print the author's "copy," or manuscript.¹⁶¹ The term *copyright* was first used by the guild to indicate which publisher had the exclusive right to publish an individual author's work.¹⁶² Thus, copyright had its origins as a right of the publisher rather than a right of the author, and represented a private agreement among members of the guild.¹⁶³ Beginning with the Star Chamber Decree of 1586, continuing with the Parliamentary Edicts of 1643, 1647, and 1649, and culminating with the Press Acts of 1662,¹⁶⁴ the institutions of the printing privilege and the guild were together used to control the publishing of blasphemous and scandalous works, administered through the Star Chamber.¹⁶⁵ The censorial use of the publishing system triggered a reaction from many authors of the

¹⁵⁷ See, e.g., J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 515-17 (1990); BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 1-38 (1967); see also LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 3-179 (1968) (providing a thorough history of English copyright); LYMAN RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS 19-31 (1991); HARRY RANSOM, THE FIRST COPYRIGHT STATUTE: AN ESSAY ON AN ACT FOR THE ENCOURAGEMENT OF LEARNING, 1710, at 17-94 (1956); ROSE, *supra* note 18, at 9-30 (giving a general history of copyrights); BRAD SHERMAN & LIONEL BENTLY, THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE, 1760-1911, at 9-60 (1999).

¹⁵⁸ PATTERSON, *supra* note 157, at 80-90; PATTERSON & LINDBERG, *supra* note 157, at 23-27; ROSE, *supra* note 18, at 20-21; SHERMAN & BENTLY, *supra* note 157, at 120-21.

¹⁵⁹ BAKER, *supra* note 157, at 515; PATTERSON, *supra* note 157, at 79 (describing the source of English printing patents); ROSE, *supra* note 18, at 11.

¹⁶⁰ BAKER, *supra* note 157, at 515; KAPLAN, *supra* note 157, at 3-6; ROSE, *supra* note 18, at 35-36.

¹⁶¹ ADRIAN JOHNS, THE NATURE OF THE BOOK: PRINT AND KNOWLEDGE IN THE MAKING 311 (1998).

¹⁶² KAPLAN, *supra* note 157, at 4-5; ROSE, *supra* note 18, at 58.

¹⁶³ PATTERSON, *supra* note 157, at 47-49; ROSE, *supra* note 18, at 14-15; SHERMAN & BENTLY, *supra* note 157, at 170.

¹⁶⁴ JOHNS, *supra* note 161, at 232-33.

¹⁶⁵ See PATTERSON, *supra* note 157, at 119-26 (explaining the Star Chamber Decree); ROSE, *supra* note 18, at 22.

time, particularly after the passage of the Licensing Act of 1662 that required a license to publish any work.¹⁶⁶ John Milton's *Areopagetica* was a manifesto for author's rights, which were recognized under the Statute of Anne in 1709.¹⁶⁷ The Statute of Anne marked a victory for authors against publishers and censorship by the state.¹⁶⁸ Although the battle between authors and publishers continues, even into the present, the censorial model of publishing was exorcised by the statute.

The early history of copyright demonstrates that cultural production and its regulation was not purely a matter of private rights. The sovereign and private entities were intimately aligned in the establishment and protection of rights in the business of publishing. The early history also demonstrates the sovereign's key role in cultural production. For example, in the 1667 case of *Stationer's Company v. Seymour*, the court examined the question of whether the king had the power to grant a printing patent to *Gadbury's Almanac*, a popular publication containing information on weather, holidays, and religious celebrations, originally published by Seymour, a printer who was not a member of the guild.¹⁶⁹ The court ruled that the king had this power because an almanac had no specific author, and therefore the king "held the property in the copy and might grant it to anyone."¹⁷⁰ Sovereign prerogative to grant printing rights were found in two other seventeenth century cases involving the publication of law books and legal reporters.¹⁷¹ While, in the case involving law books, the court did find an author's right in the books, the prerogative triumphed and the patent was found valid. In the case of the legal reporters, the court found for the sovereign's prerogative because the king "paid the judges' salaries and . . . had a special interest in the reporting of law,"¹⁷² reasoning echoed in United States cases addressing the question of copyright in judicial opinions. These cases are often noted for the

¹⁶⁶ PATTERSON, *supra* note 157, at 134-38 (describing the Licensing Act of 1637).

¹⁶⁷ See JOHN MILTON, *AREOPAGITICA* (John W. Hales ed., Oxford Univ. Press 1961) (1644).

¹⁶⁸ For a description of the Statute of Anne as protecting free speech values and correcting prior regimes of censorship, see L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L.J. 909, 942-43 (2003). For a general discussion of the censorial power of the crown, see RICHARD D. ALTICK, *THE ENGLISH COMMON READER* 53-54 (1957); JOHN BREWER, *THE PLEASURES OF THE IMAGINATION: ENGLISH CULTURE IN THE EIGHTEENTH CENTURY* 133-34 (1997); PATTERSON, *supra* note 157, at 12; ROSE, *supra* note 18, at 47; SHERMAN & BENTLY, *supra* note 157, at 36.

¹⁶⁹ ROSE, *supra* note 18, at 23.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 23-25.

¹⁷² *Id.* at 25 n.7.

discussion of an emerging notion of authors' rights, and we do note a narrowing of the sovereign's prerogative in the development of these cases.¹⁷³ For the purposes of this Article, they demonstrate the sovereign's role in cultural production and the gradual transfer of culture production from the sovereign to authors.

The most impressive example of the sovereign's role in cultural production is provided by the project of writing the King James Bible. This project was motivated by the need to publish a version of the Bible that could be made accessible to the contemporary population.¹⁷⁴ The project also served as a means of healing the wounds among Protestants and Catholics under the reign of King James I.¹⁷⁵ The Bible project has hints of the government functions I have asserted. The translation project was a group effort consisting of a committee of translators overseen by a committee of bishops who worked under strict rules and regulations.¹⁷⁶ Because of the drain on the crown's coffers during the reign of Queen Elizabeth, the translation was largely privately financed through parishes and through licenses for preaching.¹⁷⁷ There was no author associated with this project. The translation has been described as a product of "the mind of England," and as a form of cultural infrastructure, akin to a cathedral.¹⁷⁸ While this description underscores the project's role in creating a national culture, it also demonstrates the joint effort behind its drafting. Like the almanac or the court reporters, there were no authors. The King James Bible was a cultural product that had its origins in the sovereign, and illustrates that the sovereign's role in this period was greater than that of censor.¹⁷⁹

¹⁷³ *Id.* at 24-25.

¹⁷⁴ See NICOLSON, *supra* note 28, at 236-37.

¹⁷⁵ *Id.* at 120-30.

¹⁷⁶ *Id.* at 70-72.

¹⁷⁷ *Id.* at 67, 96-97.

¹⁷⁸ *Id.* at 70.

¹⁷⁹ Discussion from oral argument in *Wheaton v. Peters* illustrates the role of the sovereign's prerogative in cultural creation of law and religion:

The cases that have been decided in England have, as it should seem, turned on a question of prerogative, and not of copyright.

Such was the point in the *Company of Stationers v. Seymour*, 1 Mod. 256. "Matters of state, and things that concern the government, were never left to any man's liberty to print that would. And particularly, the sole printing of law books, has been formerly granted in other reigns."

The case in 1 Vern. 120 (Anonymous), was a motion by the *king's patentees* for an injunction to stop the sale of English bibles, printed beyond sea. The lord keeper then referred to the circumstance, that a patent to print law books had been adjudged good in the house of lords.

In the case of *Company of Stationers and Parker*, Skinner 233, Holt arg.: "agreed that the king had power to grant the printing of books concerning religion or law, and admits it to be an interest, but not a sole interest." The court inclined for

While copyright existed prior to the Statute of Anne, the important question is how the statute transformed the nature of copyright. Several cases involving the Stationer's Company held that these rights were subject to the sovereign's prerogative in granting the printing privilege, but others acknowledged the right of the authors to be compensated for their work by the publishers.¹⁸⁰ More importantly, the statute marked a break with the censorship system that was supported by copyright in the 1600s. Coming less than a hundred years after the Statute of Monopolies, which weakened the sovereign's prerogative in granting exclusive patents,¹⁸¹ the Statute of Anne liberalized publishing by taking it outside the licensing and censorship model. But two conflicting accounts muddy the implications of these changes – a liberal, market theory endorsed by Professor Rose,¹⁸² and a regulatory theory endorsed by Professor Patterson.¹⁸³ As I elaborate below, the privatization thesis mediates between these two opposing positions.

Professor Rose describes these changes as a transition from regulation to property.¹⁸⁴ By securing authors' rights, the Statute of Anne made possible the category of literary property, or rights in books and literary works akin to rights in land. The case law following the Statute of Anne is filled with the metaphor of real property as conflicting claims over literary works were resolved.¹⁸⁵ These cases represented attempts by the booksellers to regain their exclusive rights from authors in order to maintain their market position against publishers in Scotland. The publishers' legal strat-

the defendant, (who had pleaded the letters patent of the king, which granted to the University of Oxford to print omnes et omni modo libros which are not prohibited to be printed, &c.) and they said that "this is a prerogative of power which the king could not grant so, but that he might resume it, but otherwise it is of a grant of an interest."

In *Gurney v. Longman*, 5 Ves. 506, 507, Lord Erskine declared that he granted the injunction (as to publishing the *Trial of Lord Melville*) "not upon any thing like literary property, but upon this only, that these plaintiff are in the same situation, as to this particular subject, as the king's printer, exercising the right of the crown as to the prerogative copies."

The cases of *Bell v. Walker*, 1 Bro. C. C. 451, and *Butterworth v. Robinson*, 5 Ves. 709, are not sufficiently developed, to show whether they turned upon copyright proprietorship, or a proprietorship derived from a prerogative grant.

Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 649-50 (1834).

¹⁸⁰ ROSE, *supra* note 18, at 9-12 (describing the regulatory structure of the day); *see also* JOHNS, *supra* note 161, at 230-31.

¹⁸¹ *See* BAKER, *supra* note 157, at 510-17 (explaining the attack on monopolies); PATTERSON, *supra* note 157, at 86 (explaining the enactment of the Statute of Monopolies).

¹⁸² *See* ROSE, *supra* note 18, at 113-29 (explaining property, originality, and personality).

¹⁸³ *See* PATTERSON, *supra* note 157, at 222-30 (discussing copyright in historical perspective).

¹⁸⁴ *See* ROSE, *supra* note 18, at 48 (explaining the shift in the context of the Statute of Anne).

¹⁸⁵ *See id.* at 69-70.

egy was to argue that the authorial rights created were common law rights that lasted in perpetuity, like a fee simple. Through this style of argument, the booksellers attempted to reassert their monopoly. The case of *Donaldson v. Becket* represented the success of the concept of literary property, ironically by rejecting the bookseller's claim that the author's right was a common law right.¹⁸⁶ Once the author's right was established as a statutory right, it became possible to strengthen the rights of authors in the marketplace as publishers' profitability rested on the publication of new works, protected by copyright.¹⁸⁷ By creating incentives for the introduction of new books, the recognition of copyright as a statutory right (and not a perpetual right) reduced the publishers' monopoly in the publication of the old, most profitable works.

Countering this tendency to re-establish old monopolies is the use of the property metaphor to develop new markets. The equating of literary property with real property also served to empower authors, both in their battles against publishers and booksellers, and as a way of securing their own place in the emerging literary marketplace. Professor Rose documents the arguments of John Milton, Daniel Defoe, and Samuel Johnson, whose respective criticisms of the old system of licensing and advocacy of the Statute of Anne and the creation of literary property were motivated by the goal of rewarding authors.¹⁸⁸ Defeating monopoly interests was key to promoting competition and allowing authors to reap the benefits of their creation. The case of Samuel Richardson's attempt to control the dissemination of his anonymous novel *Pamela* illustrates the importance of securing authors' rights for the emerging competitive marketplace for books. As Professor William Warner states, "Richardson can only defend this commodity adrift on the open work [viz, the novel *Pamela*] by presenting himself as its author."¹⁸⁹ The creation of literary markets was made possible through a transformation in publishing from a right to print to a liberal property interest vested in authors.

Professor Patterson, on the other hand, downplays the Statute of Anne's creation of authors' rights as property. "The purpose of the Statute of Anne, then," argues Patterson, "was to provide a copyright that would function primarily as a trade regulation de-

¹⁸⁶ See *id.* at 95-97 (discussing *Donaldson v. Becket*, 98 Eng. Rep. 257 (H.L. 1774)).

¹⁸⁷ See *id.* at 110-12 (discussing the rise in authorial copyrights); WILLIAM B. WARNER, *LICENSING ENTERTAINMENT: THE ELEVATION OF NOVEL READING IN BRITAIN, 1684-1750*, at 134-35, 280 (1998) (discussing the increased need to protect authors as novel reading becomes more prevalent).

¹⁸⁸ See ROSE, *supra* note 18, at 34-37.

¹⁸⁹ WARNER, *supra* note 187, at 229.

vice – acting in the interest of society by preventing monopoly, and in the interest of the publisher by protecting published works from piracy, as did the stationer's copyright."¹⁹⁰ Contrary to Professor Rose's claim that the statute marked a shift from regulation to property, Professor Patterson claims that the Statute of Anne was just another form of regulation. There is much support for Professor Patterson's position. As he points out, the statute did not exclusively grant rights in new works to authors, but to authors and proprietors, and the preamble to the statute speaks of rights in authors and purchasers.¹⁹¹ Furthermore, he contends correctly, that the statute was modeled on the private regulation of the Stationer's Company, which recognized a copyright, albeit one held by the publisher.¹⁹²

Two conclusions follow from Professor Patterson's analysis. First is the identification of elements in the statute that make the author's right fall short of a real property interest. By allowing the right to rest in parties other than the author, the Statute of Anne seems to envision property rights that were mutable by contract. To use modern language, the Statute of Anne established default (as opposed to immutable) rules that contracting parties could re-assign through agreement. Secondly, Patterson's analysis points to the regulatory functions of the statute. The purpose of divesting the stationers of some rights and putting them in the hands of the diverse individuals was to protect the public from the harmful effects of monopoly. According to Patterson, the statute did not merely protect private interests, but sought a broader public purpose.

Professors Rose and Patterson offer contrasting interpretations of the Statute of Anne. One sees the statute as protecting and defining private interests; the other identifies a public purpose. Neither interpretation seems consistent with my privatization thesis. Professor Rose would see no government function being carried out through copyright. In a recent article, he points to several missed opportunities in English copyright history for recognizing the law's role in fostering the public domain.¹⁹³ While the *Donaldson* decision could be seen as supporting the public domain by recognizing that private rights in literary property expire and divest to the public, the decision was actually read as a compromise between the interests of authors and the interests of read-

¹⁹⁰ PATTERSON, *supra* note 157, at 14.

¹⁹¹ *See id.* at 143.

¹⁹² *See id.* at 145-46.

¹⁹³ Mark Rose, *Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, 66 LAW & CONTEMP. PROBS. 75, 77-78 (2003).

ers.¹⁹⁴ Once the statutory right was seen as a compromise, defenders of a perpetual copyright urged that this compromise be withdrawn in Parliament towards a longer duration of protection for authors.¹⁹⁵ The transformation of literary property into real property occurred, post-*Donaldson*, as a matter of legislation rather than common law adjudication.

Furthermore, Professor Patterson's position is also contrary to my privatization thesis. While he does see a public purpose to copyright in its challenge to monopoly, he would argue that this pursuit of a public purpose occurred not through privatization, but through regulation. Rather than divesting a governmental function to private parties, the Statute of Anne marked regulatory control over publishing by Parliament. The shift was from monarchical control and censorial goals to legislative control and market regulation. Private rights were created by the statute, but these rights represented a divestiture of monopoly power, not governmental power. Viewing copyright as a form of privatization or deregulation would arguably be inconsistent with the view of the Statute of Anne as a new form of regulation.

The privatization thesis, while inconsistent with the two positions independently, reconciles the two contrasting characterizations of the statute as securing and regulating property rights. One element that neither author directly addresses in their work is the creation of modern literary markets that coincided with the debates over literary property and the Statute of Anne. The example of Richardson's *Pamela* was given before to illustrate how authors' rights were instrumental in the development of a literary marketplace.¹⁹⁶ The Statute of Anne, by acknowledging the author's right, provided authors with a foothold into the marketplace, although often still at the whim of publishers and booksellers. Success in the marketplace required that authors establish their own voice and identity. Furthermore, the Statute of Anne and the *Donaldson* decision served to structure and bolster the literary marketplace in other ways. Once the copyright was viewed as statutory rather than perpetual, the need arose for publishers and booksellers to find new content that could be marketed once the copyright expired and the work fell into the public domain.¹⁹⁷ The

¹⁹⁴ See *id.* at 82-84.

¹⁹⁵ See ROSE, *supra* note 18, at 110; CATHERINE SEVILLE, LITERARY COPYRIGHT REFORM IN EARLY VICTORIAN ENGLAND: THE FRAMING OF THE 1842 COPYRIGHT ACT 15 (1999).

¹⁹⁶ See *supra* discussion in text accompanying notes 188-89; WARNER, *supra* note 187, at 200-09.

¹⁹⁷ WARNER, *supra* note 187, at 134.

demand for new content spurred the demand for new authors.¹⁹⁸ As novels diffused into all levels of society, economies of scale in the production of books could be realized, resulting in greater profits for publishers.¹⁹⁹ In short, the Statute of Anne helped to foster a literary marketplace through which the tradition of the novel was established.

Once the developments in the literary marketplace are juxtaposed with the legal developments outlined by Professors Rose and Patterson, the case for the privatization thesis is stronger. The recognition of the author's right created a marketplace in which certain interests could be pursued. By challenging traditional monopolies, the statute helped to establish a marketplace through which cultural works, such as the novel, could be produced and distributed. Professor Patterson's public minded copyright and Professor Rose's privately interested copyright are intertwined. By allowing the playing out of authors' interests against those of printers, booksellers, and readers in a competitive marketplace, the Statute of Anne permitted the realization of the public good (i.e., cultural production, the novel) through the creation of private interests.²⁰⁰ When the emerging literary marketplace of the eighteenth century is recognized, Madison's observation of the coincidence between the public good and individual claims in copyright law can be understood. The pursuit of private interests that the statute allowed by both recognizing authors' rights and defeating monopolies permitted the pursuit of the public good through the cultural production of the novel. The nineteenth century debates over copyright reform illustrate this point.

The key issue for copyright reform in nineteenth century Britain was the term of copyright. Several authors, led by a barrister and playwright named Sarjeant Thomas Noon Talfourd, spearheaded the campaign to expand the copyright term from the twenty-eight year term implemented in the 1814 Act to a term of the life of the author plus sixty years.²⁰¹ The case of *Donaldson v. Becket* played a role in this debate, standing for the proposition

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ The creation of a literary market introduced important questions of the ability of the market to produce works of merit. The debate in early and late Victorian England was precisely over copyright's ability to generate quality works, rather than works of rubbish. See, e.g., AL-TICK, *supra* note 168, at 309-11 (discussing "yellow back novels," or cheap works designed for railway reading during the mid-nineteenth century as a response to the high price of first editions); N. N. FELTES, LITERARY CAPITAL AND THE LATE VICTORIAN NOVEL 62-64 (1993) (discussing controversies over international copyright that were framed as issues of free trade and culture).

²⁰¹ ROSE, *supra* note 18, at 110-11; SEVILLE, *supra* note 195, at 16-19.

that the copyright term represented a compromise that could be renegotiated in the author's favor. The need to protect authors and their families against the threats of the marketplace, particularly piracy by unscrupulous booksellers, domestic and foreign, was the primary rationale to expand the term. In the Copyright Act of 1842, the term was extended to the life of the author plus seven years, with a minimum of forty-two years from the date of publication.²⁰² The conflicting interests leading to this result illustrate how copyright had transformed from a regulatory scheme to control censorship into a system of interests which played out in the political arena.

While authors were the chief supporters of copyright extension, critics reflected a range of interests. Radical members of Parliament who were opposed to property, particularly those in literary works, spoke out against proposed bills. Publishers and booksellers, who a hundred years earlier argued for a perpetual copyright, now were hesitant to meet the licensing demands of authors for use of their content and opposed extension.²⁰³ Workers in publishing were also not supporters of the authors' interests.²⁰⁴ Perhaps the most interesting group of opponents were private associations such as the Religious Tract Society, the Society for the Promotion of Christian Knowledge, and the Society for the Diffusion of Useful Knowledge, whose primary concerns were the availability of cheap publications and the creation of a reading public that was not weaned on the popular novel.²⁰⁵ Supporters of the authors came from segments of society that viewed authorship as a means of developing British national culture, as well as groups aligned with the creation of an international copyright, requiring each country to recognize copyright in the works of foreign authors.²⁰⁶

Victorian copyright reform suggests a blossoming of copyright law from its roots as a narrow tool of censorship into the subject of public discourse. At issue, in part, was the regulation of publishing. But broader issues of access and equity came to center stage. Opponents of extension analogized the proposed reform to the infamous newspaper stamp in the 1830s that was widely condemned as a "tax on knowledge."²⁰⁷ It was in the context of the copyright term extension debates that Lord Macauley famously

²⁰² SEVILLE, *supra* note 195, at 259-60.

²⁰³ *Id.* at 101-05.

²⁰⁴ *See id.* at 81-84 (detailing the petition patterns of the workers in publishing).

²⁰⁵ *Id.* at 105-09.

²⁰⁶ *Id.* at 153-59.

²⁰⁷ *Id.* at 46-48.

remarked that copyright "is a tax on readers for the purpose of giving a bounty to writers."²⁰⁸ Macauley's reference to tax was an assault on the copyright as monopoly. It is perhaps ironic that authors' rights, once seen as a cure to monopolies through the Statute of Anne, became the root of monopolies in Victorian copyright.²⁰⁹ This shift can be explained by a change in focus from the rights of authors to the rights of readers. However, the tax metaphor has a different meaning when copyright is contrasted with what Macauley sees as a potentially more troubling alternative – patronage.²¹⁰ The copyright tax is not simply a monopoly surcharge, but a means of financing the author – a substitute for a generous patron or a public fisc.²¹¹ The twin meanings of tax illustrate the dilemma of copyright. On the one hand, copyright creates undesirable monopolies; on the other, it provides a means of rewarding and funding authors. The famous statement illustrates the conflicting public dimensions of copyright that continue today.

In conclusion, English copyright developed from a means of censorship into a means of creating and defining interests in the literary marketplace and in debates over regulation of the marketplace. While we cannot find a single moment in which government functions in cultural production were devolved to private parties, we can see in the history (1) the use of private rights to further the sovereign's goals of censorship through the Stationer's Company, (2) the sovereign's role in cultural production in the drafting of the King James Bible, and (3) the creation of private rights that were transformed into private interests in the literary marketplace and the political arena. The conclusion is that copyright law is not purely a matter of private law, but is imbued with a public purpose that has changed from censorship to production and dissemination. With the British history as background, I turn next to the experience of the United States.

B. U.S. History and the Instrumental View of Copyright Law

Copyright's history in the United States, rooted in the eighteenth century, shows a continuation of English copyright history at the time. The Statute of Anne served as a model for state copy-

²⁰⁸ MACAULAY, *supra* note 138, at 182; *see also* SEVILLE, *supra* note 195, at 60-67.

²⁰⁹ *See* SEVILLE, *supra* note 195, at 28-30 (discussing copyright opponents' view that copyright was a monopoly, and also describing politicians' opinions that copyright law in England was unsatisfactory).

²¹⁰ *Id.* at 26 (noting that Macauley "rejected patronage with striking vehemence").

²¹¹ *See id.* at 62-63 (stating that Macauley acknowledged the need to compensate authors in order for a society to have good books, and copyright was the "least objectionable way to remunerate authors").

right law under the Articles of Confederation, and for federal copyright law under the U.S. Constitution.²¹² At the same time, the framers of the Constitution and drafters of various copyright statutes were cognizant of copyright's roots in licensing and publishing monopolies, and were wary of repeating the mistakes of England.²¹³ Copyright law in the early American republic did not mark the ascendancy of private property, but rather a recognition that "individual rights give way to the demands of the social" and "private ownership of a printed text as the temporary alienation of public property."²¹⁴ What developed in the United States was an instrumental view of copyright law through a discourse that framed copyright at times as a matter of property, and at times as a matter of economic interest. But whatever the basis, whether stable property or rootless economics, copyright in the United States was viewed in instrumental terms from the very beginning. This instrumental view is consistent with my privatization thesis.

The case for privatization can be made from what has been described as the utilitarian basis for United States copyright law that explicitly did not rest on authors' rights. The Intellectual Property Clause speaks of the copyright as a means to the end of promoting progress in science and the useful arts;²¹⁵ private rights are a means, not an end, as the Supreme Court itself has recognized.²¹⁶ Likewise, Madison emphasized the public functions of copyright in *The Federalist Papers*. The first Copyright Act, enacted in 1790, promoted the development of the free press and the distribution of knowledge by providing protection to maps, charts,

²¹² See Ochoa & Rose, *supra* note 92, at 921-23; PATTERSON, *supra* note 157, at 199.

²¹³ See PATTERSON, *supra* note 157, at 214-17 (describing Congress's discontent with the copyright laws due to the difficulty of administration and the danger of abuses); Ochoa & Rose, *supra* note 92, at 912 (describing Queen Elizabeth's practice of dispensing monopoly patents as rewards for political patronage).

²¹⁴ Meredith L. McGill, *The Matter of the Text: Commerce, Print Culture, and the Authority of the State in American Copyright Law*, 9 AMER. LIT. HIST. 21, 22 (1997).

²¹⁵ It is worth pointing out that the records of the Federal Convention include an early draft of what was to be Article I, Section 8, Clause 8, that included the following proposed Congressional powers:

To secure to literary authors their copy rights for a limited time; To establish an University; To encourage by proper premiums and provisions, the advancement of useful knowledge and discoveries; To establish seminaries for the promotion of literature and the arts and sciences; To grant charters of incorporation; To grant patents for useful inventions; To secure to authors exclusive rights for a certain time; To establish public institutions, rewards and immunities for the promotion of agriculture, commerce, trades, and manufactures.

Record of the Federal Convention, in 3 THE FOUNDERS' CONSTITUTION 40 (Philip B. Kurland & Ralph Lerner eds., 1987). It is clear from this early draft that the Intellectual Property Clause was seen as supporting the broad public purpose of promoting knowledge and the creation of what I described as cultural infrastructure.

²¹⁶ See *Feist Publ'ns, Inc. v. Rural Tele. Serv. Co.*, 499 U.S. 340, 350 (1991).

and books, and was "very important from the beginning for . . . such publishers of educational materials as Noah Webster."²¹⁷ Publishing was crucial for developing democratic systems that would challenge hierarchies both in science²¹⁸ and in religion.²¹⁹ Copyright's development in the nineteenth century was intimately connected with the development of American nationalism and cultural identity.²²⁰ In the twentieth century, Madison's sentiments are echoed in 1961 in the words of the Register of Copyrights: "As reflected in the Constitution, the ultimate purpose of copyright legislation is to foster the growth of learning and culture for the public welfare, and the grant of exclusive rights to authors for a limited time is a means to that end."²²¹ Over thirty years after these words were written, the vision has been reversed. Scholars decry the death of the public domain; private interests appear triumphant. The natural question is what has happened? A related question is whether or not the contemporary U.S. experience falsifies my argument for viewing copyright as a privatization of a government function. Is copyright, after all, just a private right?

The standard explanation for current developments is one of public choice.²²² Copyright legislation has been captured by powerful copyright interests, such as players in the entertainment, computer, and telecommunications industries. While the copyright industries are certainly dominant lobbyists in copyright reform, the public choice explanation ignores the fact that copyright law was initially enacted in 1790 at the behest of "booksellers rather than authors in an effort to encourage the publishing trade by assigning limited and alienable ownership rights without either creating monopolies or allowing unauthorized reprinting."²²³ What is different

²¹⁷ DAN LACY, FROM GRUNTS TO GIGABYTES: COMMUNICATIONS AND SOCIETY 56 (1996). For a discussion of the early history and spread of the printing press and its influence on spreading democratic values, see Richard D. Brown, *Early American Origins of the Information Age*, in *A NATION TRANSFORMED BY INFORMATION* 39 (Alfred D. Chandler, Jr. & James W. Cortada eds., 2000).

²¹⁸ See NATHAN O. HATCH, THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY 29-30 (1989) (discussing challenges to establishment medicine posed by Thomsonian medicine, a controversial advocate of natural medicines in the 1830s).

²¹⁹ See generally *id.* at 62-66 (describing the role of the popular press in the early nineteenth century in splintering American Protestantism).

²²⁰ MICHAEL WARNER, THE LETTERS OF THE REPUBLIC: PUBLICATION AND THE PUBLIC SPHERE IN EIGHTEENTH-CENTURY AMERICA 118-19, 127 (1990); see also CORNWELL, *supra* note 105, at 97-103 (describing the slow development of arts participation in Jacksonian America); GRANTLAND S. RICE, THE TRANSFORMATION OF AUTHORSHIP IN AMERICA 74 (1997) (discussing the utilitarian bases for the enactment of copyright law in the United States).

²²¹ HOUSE COMM. ON THE JUDICIARY, 87TH CONG., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 5 (Comm. Print 1961).

²²² See LITMAN, *supra* note 8, at 22-34; Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775, 798 (2003); Liu, *supra* note 150, at 448-49; Samuelson, *supra* note 139, at 1494.

²²³ RICE, *supra* note 220, at 74.

about contemporary copyright discussion is not the influence of business interests, but the shift from a public-spirited view of copyright to a view of copyright as private economic protection.²²⁴

Early American copyright debate assumed copyright to be a means to public ends, whether promoting the press, education, or the charting and mapping of the new republic.²²⁵ As Grantland Rice points out, the nineteenth century debate over perpetual copyright was informed by utilitarian conceptions of copyright as a means of shaping the contours of the American nation much in the same ways as Manifest Destiny justified its expanding geographic boundaries.²²⁶ While Professor Rice notes the growing prevalence of Lockean notions of labor and property to support copyright in the early American republic, he also reports “clear evidence of an antebellum writer’s discomfort with the whole idea of literary property.”²²⁷ He elaborates:

[D]espite the fact that most writers in antebellum America argued publicly and vociferously for the relative independence afforded by the Lockean notion of “perpetual” copyright,” there was some anxiety over the making over – in law and public consciousness – of public expression into, alternatively, property or commodity. In other words, even though writers generally endorsed Lockean constructions to protect themselves from the vicissitudes of the market, many also harbored concomitant anxieties about accepting . . . an economic rationale for their rhetorical activity.²²⁸

We find no hint of such anxieties in current copyright discourse. Although there are efforts to reform copyright to protect public values,²²⁹ the problem is a lack of public-spirited copyright discourse. Early American copyright history, in many ways, provides the basis for such discourse by demonstrating how copyright is an instrument to reach certain social ends.

²²⁴ For a discussion of the general shift in discourse from public mindedness to private centeredness, see CRENSON & GINSBERG, *supra* note 31, at 241; PUTNAM, *supra* note 75, at 277-84; MICHAEL J. SANDEL, DEMOCRACY’S DISCONTENT 317-21 (1996).

²²⁵ See, e.g., LACY, *supra* note 217, at 56 (describing copyright as an inherently national concern); WARNER, *supra* note 220, at 127 (writing that the debate assumed that well-read citizens would be useful to a country).

²²⁶ RICE, *supra* note 220, at 86-87.

²²⁷ *Id.* at 78.

²²⁸ *Id.*

²²⁹ For a discussion of some responses, see Weiser, *supra* note 50, at 545-49; and Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 YALE L.J. 1575, 1649-55 (2002) (describing reverse engineering as a policy lever).

My call for public-spirited discourse is resonant of the scholarship on civic republicanism in the late 1980s and early 1990s.²³⁰ This body of scholarship looked to early republican theory, particularly the debate between the Court Party and Neo-Harringtonians in England, and its influence on the formation of the American republic.²³¹ Such scholarship discovered a rhetoric of property in the Harringtonian tradition that was public-spirited, viewing property as a means towards establishing civil society. The Harringtonian tradition contrasted with the Court Party vision of society as one based on exchange and the exercise of the passions through commerce. Copyright was never mentioned in the civic republican literature for one simple reason: Harrington meant *land* when he used the word *property*, and the civic republican literature was largely a response to the conservative arguments in the 1980s against redistributive policies and regulation, arguments that had their strongest expression in Professor Richard Epstein's *Takings*.²³² But as my arguments suggest, copyright should also be seen in civic republican terms, particularly with the increasing need for identifying a public basis for a body of law that is becoming wholly private.

Needless to say, copyright does not fall so neatly into the debate between Harringtonian and Court Party traditions. Copyright is different from real property. Although some claim it to be a common law right, copyright's roots are a mix of sovereign privilege and private regulation. The contemporary view, after *Donaldson v. Becket*, is that copyright is purely a creation of statute and no longer has common law roots.²³³ Another view, following Professor Patterson, would place copyright in the category of regulation.²³⁴ Copyright would not be a property right, but rather, an economic interest that is rewarded in the marketplace and can be modified by the state. None of these views seem to match Harrington's vision of property as fixed and stable, guarding against

²³⁰ See, e.g., William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335, 1338 (1991); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1548-49 (1988) (describing republicanism in both the founding period and in contemporary society); cf. Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 854-79 (1993) (criticizing scholars' embrace of civic republicanism).

²³¹ See POCOCC, *supra* note 32, at 507-08.

²³² See generally *Symposium on Richard Epstein's Takings: Private Property and the Power of Eminent Domain*, 41 U. MIAMI L. REV. 1 (1986); see also GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY* 7 (1997) (criticizing pseudo-history or property in Supreme Court takings jurisprudence).

²³³ PATTERSON, *supra* note 157, at 7-8 (noting that the U.S. Supreme Court followed *Donaldson*, which limited the protection of published works to the statutory copyright, and viewed American copyright as a descendant form of the Statute of Anne).

²³⁴ See *id.* at 223-24 (discussing copyright statutes as trade-regulation devices).

the corruptions of government. In some ways, copyright, as the child of monopoly privilege, would reflect the kind of corruptions that Harrington sought to exorcise from the body politic.²³⁵

Even if copyright does not neatly fit into the stable, fixed notion of property, and is more akin to intangible interests such as credit and money, of which the Harringtonians were suspicious, the discussion of copyright in the early American republic has much in common with the role of land in the Harringtonian scheme. The irony is that early republican thinkers recognized the evils of copyright, with its roots in monopoly and censorship, but also understood its necessity in the development of a literary and cultural marketplace necessary for the growth of the new republic.²³⁶ Copyright, as an economic right, was instrumental for the creation of republican culture.²³⁷ Even those who argued for treating copyright as property, reviving the common law right in literary property as a perpetuity, did so in instrumental terms. In fact, Harringtonian-type arguments were made for copyright in terms of removing copyright altogether from the legislative realm and restoring its common law origins. The tension between monopoly and markets is demonstrated by the early debates over copyright that were part of the Constitution drafting process.²³⁸ These debates culminated in the first U.S. Supreme Court case about copyright, *Wheaton v. Peters*,²³⁹ often described as the *Donaldson v. Becket* of the United States, but more accurately characterized as endorsing an anti-monopoly view of copyright. The quasi-Harringtonian arguments for copyright can be found in the debates in the 1830s over international copyright. These pieces of history from the early republic illustrate the instrumental thinking that informed copyright, which saw the creation of rights as necessary for the building of a republic.²⁴⁰ This conception of copyright reinforces Professor James Willard Hurst's description of property theory in the early nineteenth century as facilitating "the release of

²³⁵ See POCOCK, *supra* note 32, at 459-60 (describing the belief that a society was better off as a fixed society, with institutions, order, and value).

²³⁶ See AUBERT J. CLARK, THE MOVEMENT FOR INTERNATIONAL COPYRIGHT IN NINETEENTH CENTURY AMERICA 25-28 (1960); PATTERSON, *supra* note 157, at 214-15; SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS 6 (2001); Ochoa & Rose, *supra* note 92, at 916-17.

²³⁷ See WARNER, *supra* note 220, at 115-17.

²³⁸ PATTERSON, *supra* note 157, at 192; Ochoa & Rose, *supra* note 92, at 912-14.

²³⁹ 33 U.S. (8 Pet.) 591 (1834).

²⁴⁰ See CLARK, *supra* note 236, at 50-51 (describing the belief that international copyright would help America develop a national body of literature); VAIDHYANATHAN, *supra* note 236, at 51; Shubha Ghosh, *The Merits of Ownership: Or, How I Learned to Stop Worrying and Love Intellectual Property*, 15 HARV. J.L. & TECH. 453, 468-70 (2002).

energy” which “coupled concern for vested rights with a high regard for keeping open the channels of change.”²⁴¹

At the heart of the debate was the question of recognizing copyright in the works of foreign authors, essentially repealing Section Five of the Copyright Act of 1790, which permitted pirating of non-U.S. works.²⁴² The debate was three pronged, consisting of advocates for the international copyright, a group opposed to the international copyright, and a third group that advocated the creation of a perpetual, common law based copyright instead of the international copyright. Each set of advocates emphasized different effects of the copyright system, but they all shared an instrumental vision of copyright as the creation of private right to meet public ends.

Spearheading the initiative for an international copyright was Senator Henry Clay, who introduced several bills during the 1830s, none of which passed.²⁴³ Senator Clay analogized copyright piracy to theft of personal property:

A British merchant brings or transmits to the United States, a bale of merchandize, and the moment it comes within the jurisdiction of our laws, they throw around it an effectual security. But if the work of a British author is brought to the United States, it may be appropriated by any resident here, and republished without any compensation whatsoever being made. This distinction in the two descriptions of property [is] unjust.²⁴⁴

The analogy between literary works and bales of merchandise indicates the attempt to classify copyright within the conventional categories of property, whether as real property, or, as in this case, as personal property. Senator Clay's rhetoric effectively turns copyright into a commodity. In addition, copyright becomes a

²⁴¹ JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 27 (1956). Mention of copyright is noticeably absent from the vested rights debate. The single reference to copyright in the context of vested rights that I could discover is in a book review by Professor Alfred Brophy. See Alfred L. Brophy, *Losing the Understanding of the Importance Of Race: Evaluating the Significance of Race and the Utility of Reparations*, 80 TEX. L. REV. 911, 927 n.62 (2002). This lack of interest could be in part a reflection of copyright's status, until recently, in the backwaters of academic discourse. But the discussion in the text demonstrates the importance of the vested rights debate to copyright in the nineteenth century. Another explanation for the lack of interest is copyright's status as a government created “property right” as opposed to the regulation of property. But, of course, the central debate in copyright, then and now, is the extent and stability of this right. The nineteenth century debate over international copyright has relevance for how we conceive of copyright as property today.

²⁴² PATTERSON, *supra* note 157, at 198.

²⁴³ See CLARK, *supra* note 236, at 42-43; VAIDHYANATHAN, *supra* note 236, at 51.

²⁴⁴ *Literary Property*, 4 N.Y. REV. 273, 293 (1839).

commodity of international trade, suggesting another instrumental goal for copyright law as furthering global commerce. The emphasis on commercial interests, particularly international ones, are consistent with Senator Clay's vision of the "American system," or the use of government power for nation building through economic expansion and growth.²⁴⁵ The role of copyright in building the American system is further demonstrated by a common argument that was made in support of international copyright: the importance of recognizing rights in foreign works in order to promote American authors in the marketplace.²⁴⁶ Piracy, the argument went, gave British authors an unfair advantage in the marketplace by allowing their works to be marketed at a cheaper price than the works of American authors protected by copyrights. International copyright allowed British and American authors to compete on a level playing field. This argument often construed the international copyright as a tariff on the works of British authors, restricting their entry into the American marketplace.²⁴⁷ Copyright as personal property, copyright as internationally traded commodity, and copyright as tariff are the three major turns that the conception of copyright took during the 1830s. Each supported an instrumental use of copyright to further the American economy and American culture.

The opponents of the international copyright were equally instrumental. The strongest opposition came from publishers and booksellers who thrived on cheap copies of English books.²⁴⁸ The international copyright as tariff only hurt their interests by pushing up the price of books that they would buy at wholesale, and by reducing the quantity they could sell at retail. In addition to the economic criticism of the international copyright, opponents offered a cultural argument. International copyright, according to the opponents, would not necessarily enhance American literary culture.²⁴⁹ Cultural enhancement required access to English works so that the American reader could keep up to date on the latest developments in the Old World in all fields of knowledge. Furthermore, cheap English books were important for American authors so that they

²⁴⁵ See MAURICE G. BAXTER, *HENRY CLAY AND THE AMERICAN SYSTEM* 57-58 (1995); see also CHARLES SELLERS, *THE MARKET REVOLUTION* 290 (1991) (describing the use of tariffs to provide funding for internal improvements such as roads and canals).

²⁴⁶ See VAIDHYANATHAN, *supra* note 236, at 60-61 (writing that American authors' books were too expensive to compete with the pirated copies of foreign authors); *International Copyright*, 4 S.Q. REV. 1, 2-3 (1843).

²⁴⁷ *International Copyright*, *supra* note 246, at 3.

²⁴⁸ See CLARK, *supra* note 236, at 108-09; *International Copyright*, *supra* note 246, at 6-7.

²⁴⁹ Philip H. Nicklin, *Literary Property*, 2 U.S. MAG. & DEMOCRATIC REV. 289, 291-92 (1838).

could learn (and implicitly copy from) the style and accomplishments of their British peers. These arguments, although not utilizing the term *public domain*, anticipate many modern arguments about the importance of access and copying to the dissemination of culture and the creation of culture through accretion. Finally, the opponents argued that the promotion of American culture required a healthy publishing industry and book trade, without which authors' works could not be published or disseminated at all.²⁵⁰ Mirroring the arguments of advocates, the opponents were equally instrumental in their vision of copyright.

Finally, the opponents who supported a perpetual copyright rather than an international copyright offered a particularly interesting and complex perspective that deserves detailed attention. This group represented a range of interests, including proponents of a stronger American culture, advocates for authors, and Southerners skeptical of the publishing industry and book trade that was almost wholly concentrated in the North.²⁵¹ For this group, the debate over international copyright missed the real issue. Although they accepted, for the most part, arguments about the importance of protecting authors' rights in the marketplace, they contended that the only meaningful way to protect those rights was by recognizing a common law right of perpetual copyright, much like a fee simple interest in land.²⁵² By recognizing a perpetual right in every author, wherever a resident, the international copyright issue would become effectively moot.

It is important to note how the arguments for a perpetual copyright in the United States compared with those made in seventeenth century Britain. For while the booksellers looked to the common law right to ensure their monopoly, and based the common law right on natural law notions, proponents of a perpetual copyright in the United States of the 1830s were supporting authors' rights in order to promote a national culture. The American proponents assuredly made natural rights arguments. As one writer explained: "What then is the principle of right on which the present appeal to our liberality is founded? *It is the sacred principle of property.*"²⁵³ The author continues:

²⁵⁰ *Id.* at 291.

²⁵¹ See generally *International Copyright*, *supra* note 246; *Literary Property*, *supra* note 244, at 273; Nicklin, *supra* note 249.

²⁵² See *International Copyright*, *supra* note 246, at 7-8 (stating that literary property in some countries is treated like real estate, belonging solely to those who produced it); *Literary Property*, *supra* note 244, at 275-76; Nicklin, *supra* note 249, at 293-94.

²⁵³ Nicklin, *supra* note 249, at 293.

The principle of PROPERTY is the key-stone of the arch of society. It is the first, deepest, and most sacred, of the principles of social order and law – those at least which are purely human in their nature and relations. . . . The right of property in the creations of original individual effort . . . is unquestionably a natural moral right, antecedent and superior to legislation; being the object and motive of social union, rather than its effect and consequence.²⁵⁴

Grantland Rice cites this same passage as evidence of the triumph of “individualism and private sovereignty” and “the insolubility of a Lockean notion of property.”²⁵⁵ His conclusion is unwarranted for two reasons. First, a Harringtonian tradition existed within Locke’s theory that supported private property not as an end in itself, but as a means to republican citizenship.²⁵⁶ Furthermore, the natural rights language, represented in this passage, is accompanied by instrumental objectives to promote the broader public welfare. For example, one advocate spoke of the need for a perpetual right to allow literary culture to flourish in the United States, tracing the poverty of American literary culture to the lack of a strong property right, and hence incentive, in works. One author stated the point with particular passion:

We want, in a word, a home literature – fresh, original, and vigorous in its tone, and such as we may have, if we are left to ourselves, free to work out the problem of our country’s fame with our own American energies, fearing, all the while, no intrusion either from abroad or at home, except what results from a fair competition of mind struggling with mind on equal ground and with honorable weapons. In order that we may have such a literature, nothing more is necessary, than that we should avail ourselves of our opportunities, and maintain and protect our own rights by the very simple process of yielding, in all good fellowship, their rights to others.²⁵⁷

The common law copyright promoted cultural development. The recognition of a right in perpetuity fully rewarded authors and would permit them to devote their energies to creation. The de-

²⁵⁴ *Id.* at 294.

²⁵⁵ RICE, *supra* note 220, at 89.

²⁵⁶ “It is not clear that Locke meant to attack the Neo-Harringtonian critics of society, and there is little sign that they felt the need to assail him.” POCOCK, *supra* note 32, at 451. For a fuller discussion of the relationship between Locke and the Harringtonian tradition, see POCOCK, *supra* note 32, at 450-56.

²⁵⁷ *International Copyright*, *supra* note 246, at 45.

fense of common law copyright in the United States was not based on natural rights, but on instrumental goals. Responding to the instrumentalism of international copyright advocates and opponents, defenders of perpetual copyright responded in kind in order to turn the copyright debate from a matter of statute to one of common law.

The combination of natural rights and instrumentalist arguments created a unique theory of copyright, one that demonstrated the tension between copyright and real property. When Harrington spoke about stability and order through property, he was referring to land and thinking largely about an agrarian society. His concern, like that of his contemporary John Locke, was with "the engrossment of land by a privileged class" which "threatened the natural rights of those left landless."²⁵⁸ Harrington proposed "agrarian law limiting the size of estates in order to prevent the monopolization of land by a privileged class."²⁵⁹ The early advocates of perpetual copyright in the United States had an analogous concern for copyright. By limiting the duration of the creator's rights, statutory copyright engrossed publishers and booksellers who were able to obtain works from the public domain. While Harrington proposed limiting the size of estates for a more equitable division of land, copyright reformers sought to make the period of copyright perpetual. Ironically, American agrarian land reformers who followed Harrington were themselves accused of confiscating property through the redistribution of estates. One author noted the tension:

"Agrarianism," in the sense of disregard to the sanctity of the principle of property, is one of the courteous epithets with which the political school in which we belong is commonly assailed by its opponents. We are certainly no friends to restrictive legislation and the creation of partial interests and so-called vested rights, in derogation of . . . equality of rights; we should be glad, however . . . where the sacred principle of true, rightful, natural property is distinctly involved, if those who assail us would vie with us in redeeming it from its long abused state of contempt and violation.²⁶⁰

²⁵⁸ JEFFREY SKLANSKY, *THE SOUL'S ECONOMY: MARKET SOCIETY AND SELFHOOD IN AMERICAN THOUGHT, 1820-1920*, at 121 (2002).

²⁵⁹ *Id.* at 30.

²⁶⁰ Nicklin, *supra* note 249, at 296-97.

In other words, agrarian reform is about equality; copyright reform is about liberty through the restoration of “true, rightful, natural property,” property that is created through one’s labor.²⁶¹

The comparison of agrarianism and copyright reform demonstrates the distinction between real property and copyright. This distinction can be seen in the response to the claim that copyright is a monopoly. The author who spoke of agrarianism responded to the monopoly argument by identifying a *reductio ad absurdum*. If copyright is a monopoly, then all property rights obtained through the fruits of one’s labor are monopolies and therefore all property rights should be time limited. Other authors simply distinguished copyright as a monopoly when recognized as a publisher’s right, as under the Stationer’s Company, and copyright as a right in the fruits of one’s labor, when recognized as an author’s right. For the agrarian-minded reformers, however, real property, when concentrated, would be a monopoly, needing to be divested. Copyright, according to their argument, could never be a monopoly since the product of copyright was the fruit of one’s labor, and one had a natural right to exclude others from such fruits.

Another distinction between real property and copyright emerges from the writings of the perpetual copyright proponents. The Southern defender of perpetual copyright acknowledged distinctions between land and copyright even while invoking real property metaphors:

[A] person may light his candle at another’s lamp, may warm himself at a fire which another has kindled, may admire a house that another had built, and may smell flowers that others have planted, without doing injury to the owner of the lamp, the kindler of the fire, the builder of the house, or the planter of the flowers: and it will be as readily conceded that the principle of Property is not so exclusive, as to forbid the unlimited diffusion of a blessing which God has chosen one man to be the minister of to the race – provided this diffusion does not diminish each man’s special enjoyment of his own, or in any manner interfere with him.²⁶²

The passage begins with examples unrelated to real property and ends with an endorsement of property that evokes the absolute right to exclude associated with real property. The fire, the house, the flower, and the light are all creations, products of effort. The author of this passage recognizes that there is no objection to the

²⁶¹ *Id.* at 297.

²⁶² *International Copyright*, *supra* note 246, at 29.

shared use of these creations. Shared uses do not justify piracy, however, because piracy is a violation of one's right to enjoy the fruits of one's labor. Piracy interferes with the creator's "enjoyment of his own." What is important about this passage is that it recognizes copyright as exclusion from a use and the ability of this use to be shared by multiple parties, unless there is interference with the right to enjoy the fruits of one's labor. The passage demonstrates, despite the analogies to land, the differences between copyright and conventional forms of property, whether real or personal.

While the Harringtonian notions of property are evident in the writings of the defenders of the perpetual copyright, so too are the cracks in the notion of property. Land could be redistributed when monopolized, while the copyright could not be taken from the author, and hence was not a monopoly. Furthermore, the copyright is allied to use rights and intangibles, such as style and sentiment, while land is tangible. Each of these conclusions demonstrates the complicated views of property emerging during this time, and the peculiar role that copyright played as property necessary for a stable order. What is interesting about these authors is that no one seemed to see a tension between copyright as a perpetual right of the author and the copyright as a use right. While the Southern advocate acknowledges copyright may be shared, he does not see how making a copyright into a perpetual right might limit sharing. If the kindler of flame or builder of a house were given a perpetual right in their creation, how is sharing to be protected and permitted, other than through the whim of Prometheus or Sir Christopher Wren? This question is an admittedly modern question, one steeped in twentieth century developments in economic, political, and legal theory. But the question reflects the difficulty of the Harringtonian theory as it appears in the international copyright debate, and particularly the difficulties posed by trying to fit discussions of copyright into real property thinking.

As may be gathered from this discussion, the advocates of perpetual copyright lost. They were in many ways peripheral to the debate. After *Wheaton v. Peters*,²⁶³ the copyright debate remained statutory, a matter for Congress to legislate and negotiate through international treaties.²⁶⁴ European countries entered into the Berne Convention that came into force in 1897, which was the

²⁶³ 33 U.S. (8 Pet.) 591 (1834).

²⁶⁴ See PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT §§ 2.1.2.1-2.1.2.3 (2000); see also Netanel, *supra* note 91, at 233-38 (discussing the WIPO and the Berne Convention as well as other agreements).

first significant international copyright treaty. The United States did not join Berne until 1989, but did grant limited rights to non-U.S. authors in 1891 through the enactment of the Chace Act.²⁶⁵ With the accession to Berne in 1989, the United States recognized international copyright through negotiation of a multilateral treaty.²⁶⁶ The passage of TRIPS in 1994 as part of the Uruguay Rounds marked the further ascendance of international copyright.²⁶⁷ The possibility of perpetual copyright seemingly has vanished with the Supreme Court's recent decision in *Eldred v. Ashcroft*,²⁶⁸ holding that Congress cannot grant perpetual duration for copyright although it can, in theory, perpetually extend terms.²⁶⁹ Despite these defeats, I would contend that the ghosts of the perpetual copyright advocates roam among us even now. Arguments about copyright as property, about copyright as a reward for labor, and about the importance of copyright for creating social stability each are echoes of the obscure writings from the 1830s.

What also remains is an instrumental view of copyright, one that sees the creation of private rights as a means of expanding public welfare. The instrumental vision comes out of not only the writings of the advocates of common law copyright, but also from the writings of proponents and opponents of international copyright. Copyright instrumentalism provides a basis for informing copyright theory and doctrine with public values. The difficulty is that copyright does not fit neatly into civic republican property. Harringtonianism, grounded in an agrarian system with land as the principal asset, does not carry over into the world of copyright, which embraces intangibility and markets in a way inimical to Harrington's vision of a stable order. The current challenge is to recognize public values in the privatized world that is created by copyright. The notion that copyright could be used to promote American culture and the American republic is a common theme running through many authors' works during the early part of American republic. While these thinkers differed in the mechanism through which copyright was supposed to effect advancements in culture, they shared an instrumental vision of copyright.

²⁶⁵ Act of March 3, 1891, ch. 565, 26 Stat. 1106.

²⁶⁶ The signing of the Berne Convention followed the passage of the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified at 17 U.S.C. § 101 (Supp. 2002)).

²⁶⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 108 Stat. 4809, 1869 U.N.T.S. 299.

²⁶⁸ 537 U.S. 186 (2003).

²⁶⁹ *Id.* at 198, 241.

In short, copyright evolved from a means of censorship in England to a tool of advancement and progress in the United States.

C. Summary

Copyright has had many faces through history: as a tool of censorship, as a check on monopoly, as a means of developing a national culture, and as an instrument for democratization and market creation. I have argued in Part I that copyright can be seen as a means of devolving government functions in cultural production to private hands. I have suggested this conception of copyright permits the recognition of the public values that inform copyright. The analysis of this section has not shown a perfect match between theory and historical fact. But there is some support in the historical record for my privatization thesis. Before the Statute of Anne, copyright existed as means of carrying out the censorial role of the crown through a private guild. After the Statute of Anne, copyright in England served to create a literary marketplace through the recognition of authors' rights. The experience of the United States provides an instrumental vision of copyright as a means to promote learning, to regulate monopoly, and to develop a distinctively American culture. The history I have discussed illustrates copyright's balance among the government's functions, private creators, users, private regulators of content (such as publishers) and the marketplace. The privatization thesis presents a model to organize and understand the varied faces of copyright.

III. PRIVATIZATION IN CONTEMPORARY COPYRIGHT DOCTRINE

My thesis is that copyright can be understood as a devolution of several principal government functions in cultural production: financing, the provision of cultural infrastructure, and distributional goals. In this Part, I focus on three sets of cases that both echo historic problems and test the boundaries of copyright: copyright disputes involving the use of model code, disputes involving copyright in religious texts, and disputes arising under the Digital Millennium Copyright Act. The first two examples neatly fit into my thesis. In the model code cases, the government is devolving the government function of drafting laws to a private party.²⁷⁰ In the religious text cases, copyright is being used to promote the development of religious cultural artifacts that can be marketed by a religiously affiliated organization to fund its activities.²⁷¹ The

²⁷⁰ See *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791 (5th Cir. 2002); see also Ghosh, *supra* note 25.

²⁷¹ See *Worldwide Church of God v. Phila. Church of God*, 227 F.3d 1110 (9th Cir. 2000);

DMCA's place in the privatization skein is more complicated for two reasons. First, the DMCA serves to devolve the government's function in providing security by deputizing private parties to police against the hacking of security systems using decryption technology that can crack encrypted codes used by both the government and private entities.²⁷² In this way, the DMCA parallels the pre-Statute of Anne use of copyright. However, the DMCA also marks a privatization of copyright law itself by permitting owners of copyrighted materials to protect their works through technological, rather than legal, means.²⁷³ Through these three examples, I show how my privatization thesis can aid in understanding current copyright disputes. This understanding will support my proposals for revitalizing copyright law through recognition of the public values that have been devolved into private hands.

A. Copyright's Role in Privatizing Law Making

The model code cases provide strong support for my privatization thesis. The cases share a common fact pattern.²⁷⁴ A private standard-setting or code-drafting organization has had its standards or code enacted into a regulation or statute. The defendant has copied or made other use of the standard or code, either as enacted or in its draft form. The organization's claim in copyright is that the copying, or other use, interferes with its ability to market the code and undercuts the incentives for engaging in code drafting. Several types of draft standards and codes have been the subject of litigation, including county tax maps, classificatory schemes for medical practices, and model building and plumbing codes.²⁷⁵ The use of private entities to draft standards and codes, of course, are not limited to these areas.²⁷⁶ The Uniform Commercial Code is

see also Cotter, *supra* note 26 (discussing the needs of religious organizations to disseminate their religious texts).

²⁷² See *supra* notes 10 and 29.

²⁷³ See *supra* notes 10 and 29.

²⁷⁴ There are four principal cases: *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791 (5th Cir. 2002); *County of Suffolk v. First Am. Real Estate Solutions*, 261 F.3d 179 (2nd Cir. 2001); *Practice Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516 (9th Cir. 1997); *Bldg. Officials and Code Adm'r v. Code Tech., Inc.*, 628 F.2d 730 (1st Cir. 1980).

²⁷⁵ For the treatment of county maps, see *County of Suffolk*, 261 F.3d 179. For classificatory schemes, see *Practice Mgmt. Info.*, 121 F.3d 516. For building codes, see *Veeck*, 293 F.3d 791, and *Bldg. Officials*, 628 F.2d 730.

²⁷⁶ For a history of the development of legislation and codification in the United States, see GEORGE S. GROSSMAN, *LEGAL RESEARCH: HISTORICAL FOUNDATIONS OF THE ELECTRONIC AGE* 145-92 (1994) (describing the shifts in publication and dissemination of legislation from the independent colonies through the early republic, the nineteenth century, and the movement towards model codes in the twentieth century); see also Allison Dunham, *A History of the National Conference of Commissioners on Uniform State Laws*, 30 *LAW & CONTEMP. PROBS.* 233, 237 (1965) (describing the need for uniformity and the protection of state law-making authority

one familiar example of a model code drafted by a private body and enacted into public law. Portions of federal health, safety, and environmental regulations provide other examples. The development of private standard and code drafting can be seen as a reflection of the expansion of the administrative state during the twentieth century and the consequent growth in legislation and regulation.²⁷⁷

However, many of the issues in the model code cases parallel those in *Wheaton v. Peters*,²⁷⁸ the first copyright case heard by the Supreme Court. At issue in the *Wheaton* case was the copyrightability of federal judicial opinions. The Court held that federal judicial opinions were not copyrightable because judges, as paid bureaucrats, did not need the incentive to create opinions.²⁷⁹ The Court extended this holding to state judicial opinions in 1888,²⁸⁰ and several lower federal courts in the late nineteenth century held that state legislation, when drafted by the state, similarly was not the subject of copyright.²⁸¹ Federal legislation has been

from federal power); Herbert F. Goodrich, *The Story of the American Law Institute*, 1951 WASH. U. L.Q. 283, 286 (1951) (describing the need to aid attorneys in searching the vast body of state and federal law for authority). For a general history, see JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 46-81 (1950) (detailing the uses of the legislature in the eighteenth, nineteenth, and early twentieth centuries). Several studies have analyzed the process of standard setting and rule making more recently. See ROSS E. CHEIT, *SETTING SAFETY STANDARDS: REGULATION IN THE PUBLIC AND PRIVATE SECTORS* 149-207 (1990); Robert W. Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329, 1366 (1978) (discussing local plumbing and building codes); Errol E. Meidinger, *Environmental Certification Programs and U.S. Environmental Law: Closer Than You May Think*, 31 ENVTL. L. REP. (ENVTL. L. INST.) 10162 (2001) (arguing that environmental standards set by non-governmental organizations are becoming increasingly more important in today's society).

²⁷⁷ See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 83-85 (1982) (discussing the statutorification of American law); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 403-06 (2d ed. 1985) (discussing the codification movement in America); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 117-21 (1992) (discussing the codification movement in the nineteenth century); *id.* at 211-12 (discussing the Uniform Commercial Code); Markus Dirk Dubber, *Penal Panopticon: The Idea of a Modern Model Penal Code*, 4 BUFF. CRIM. L. REV. 53, 59-67 (2000) (discussing the background to the drafting of the Model Penal Code); Allen R. Kamp, *Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325, 329-34 (1995) (describing the goals of modernism in legal reform); G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 LAW & HIST. REV. 1, 4-16 (1997) (describing the crisis in jurisprudence during the early twentieth century).

²⁷⁸ 33 U.S. (8 Pet.) 591, 649-50 (1834).

²⁷⁹ *Id.*

²⁸⁰ *Banks v. Manchester*, 128 U.S. 244 (1888).

²⁸¹ See *Howell v. Miller*, 91 F. 129 (6th Cir. 1898) (holding that Michigan statutes were not copyrightable); *Davidson v. Wheelock*, 27 F. 61 (C.C.D. Minn. 1866) (holding that Minnesota state statutes could be freely copied but that the reporter could obtain a copyright in compilation and analysis); *Harrison Co. v. Code Revision Comm'n*, 260 S.E.2d 30 (Ga. 1979) (considering the challenge by a private publisher of state authorization granting the publication rights of statutes to the Michie Company).

exempted from copyright since 1909.²⁸² The model code cases present a novel question for the courts: Is privately drafted legislation or regulation subject to copyright? The courts are split on this issue, with the Second and Ninth Circuits holding that copyright does apply, and the First and Fifth Circuits holding that it does not.²⁸³

The legal treatment of privately drafted codes reflects policy conflicts over the values of privatization in the context of legislation. As legislation and regulation grow more complex and technical, the need for expertise increases.²⁸⁴ Such expert knowledge can be gleaned through the testimony of experts in committees or as part of public hearings.²⁸⁵ Federal notice and comment rule making is one means of obtaining the requisite input of experts.²⁸⁶ Governmental bodies, like the National Academy of Science, can be commissioned or can commission private bodies to research and report on specific issues pertinent to policy.²⁸⁷ Of course, legislators themselves may become expert in relevant areas, and experts may seek legislative positions to aid in the drafting of difficult, technical statutes and rules. Private code drafting, in theory, addresses many of these concerns by permitting a wider set of expert voices to be heard and to assist in the actual writing of the statutory language. The legislature can then review the privately drafted code and choose to enact it or not enact it after deliberation over the effectiveness of the draft.

Private code drafting, it is argued, also allows for uniformity in the law and for the voicing of a broader set of interests in the legislative process.²⁸⁸ The Uniform Commercial Code, as the

²⁸² 17 U.S.C. § 8 (as amended Dec. 31, 1977). Section 8 excluded works of the United States Postal Service, an exclusion that continues today under the Postal Reorganization Act of 1970. See H.R. Rep. No. 94-1476 (1976); Copyrights Act, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

²⁸³ See Ghosh, *supra* note 25; cases cited *supra* note 274.

²⁸⁴ See CHEIT, *supra* note 276, at 202-05 (discussing the procedural difficulty of adopting public standards as knowledge evolves).

²⁸⁵ See CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 65-70 (1994).

²⁸⁶ See *id.* at 52 (setting out core elements of rule making: information, participation, and accountability); BERNARD SCHWARTZ, ADMINISTRATIVE LAW 195-96 (2d ed. 1983) (pointing out that agencies seek informed views of those affected by policy making).

²⁸⁷ See *About the NAS: History*, National Academy of Sciences, at [http://www4.nationalacademies.org/nas/nashome.nsf/\(leftnav\)/AboutTheNAS_History?OpenDocument](http://www4.nationalacademies.org/nas/nashome.nsf/(leftnav)/AboutTheNAS_History?OpenDocument) (last visited Nov. 12, 2003) (noting that the NAS was created to perform government studies).

²⁸⁸ See Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435 (2000). For excellent discussions of the current legal issues, see Irina Y. Dmitrieva, *State Ownership of Copyrights in Primary Law Materials*, 23 HASTINGS COMM. & ENT. L.J. 81, 109-19 (2000) ("State governments have several incentives to claim copyright in primary law materials. . . . [and m]ost states still claim some copyright interest in their statutory

name implies, is perhaps the best example of the value of uniformity through private code drafting. Once the code has been drafted many legislatures can study it and deliberate. The model code serves as a template from which a specific legislature can borrow, alter, or adopt verbatim. Even if each legislature adopts a variant of the code, the model serves as a reference point for comparison and interpretation. One can imagine that a market for codes now becomes possible as different code drafting services offer alternate models and vie for adoption by the legislature. The creation of this market for codes, in theory, permits a more open process for the enactment of legislation. Instead of relying on hearings, which may be open or closed, and the opinions of a few, select experts, the legislature can rely on a wider group of opinions either expressed within a code drafting organization or across different code drafting organizations. Consequently, democratic deliberation and law making are enhanced by the market.

But of course this is the ideal theory behind private code drafting. Opponents fear that the market may actually supplant democracy as legislatures are captured by code drafting organizations.²⁸⁹ The horrors of government contracting, such as cost overruns and inefficient service, are recounted by critics of code drafting through the market.²⁹⁰ The defense of privatization assumes an ideally competitive market for the drafting and dissemination of code. But markets can become concentrated, and private law making would be the product of a closed process. Support for this fear can be seen in recent consolidations among private code drafting organizations in the field of building and plumbing codes.²⁹¹

codes, court reports or administrative regulations.”); Sharon K. Sandeen, *Preserving the Public Trust in State-Owned Intellectual Property: A Recommendation for Legislative Action*, 32 MCGEORGE L. REV. 385, 17-418 (2001) (surveying how states treat their intellectual property and concluding that states should dedicate their intellectual property to the public trust unless there is a clear showing that the public interest is benefited by an exception to that policy); R. Perry Sentell, Jr., *Binding Contracts in Georgia Local Government Law: Configurations of Codification*, 24 GA. L. REV. 95, 99 (1989) (defending the codification movement in Georgia); Deborah Tussey, *Owning the Law: Intellectual Property Rights in Primary Law*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 173, 192-208 (1998) (describing the economics of the legal database industry and governing law); Andrea Simon, Note, *A Constitutional Analysis of Copyrighting Government-Commissioned Work*, 84 COLUM. L. REV. 425, 465-66 (1984) (questioning copyrights in government commissioned works on First Amendment grounds).

²⁸⁹ As one attorney, supporting *Veeck*, put it: “[C]opyrighting the law puts the citizens in the position of the Romans of Caligula’s time, when certain taxes had been proclaimed but not published in writing.” Ted Wendling, *Veeck Builds Case in Copyright Fight*, PLAIN DEALER (Cleveland), Jan. 12, 2003, at A1.

²⁹⁰ See, e.g., Ellen Dannin, *To Market, To Market: Legislating on Privatization and Sub-Contracting*, 60 MD. L. REV. 249 (2001).

²⁹¹ In October 2002, SBCCI consolidated with two other code developing organizations to form the International Code Council (ICC). The consolidated entity has launched an Internet-based subscription service to grant access to the model codes. *Code Update*, CONSULTING-

Copyright's role in this scheme of privatization is apparent. By giving a copyright in the model code to the drafters, the private organization can finance its activities through sales of copies of the code, possibly to state legislatures, but more likely to lawyers, libraries, and practitioners who need the code for their profession. The model code serves as a form of public infrastructure, providing a reference point for deliberation, criticism, and reform. Finally, copyright, by allowing drafters to secure rights in their model code, aids in expanding the set of voices heard in the drafting process, since anyone can enter the market for model codes and be secure that his or her draft code will not be misappropriated. In the case of model codes, copyright is used as a tool to privatize the government function of law making.

Private code drafting organizations defend their copyright over model codes precisely in these terms.²⁹² Absent a property right in the code, they argue, the organizations cannot recoup their investment in code drafting, and the business becomes unprofitable.²⁹³ The private organizations recognize the public values at issue, particularly issues of due process arising from access to the law. But the organizations also assert that there are no due process issues raised because the private entity is not denying access to the law, just the ability to make unauthorized uses of the text of the law.²⁹⁴ As long as the code is available in public libraries or county entities, denial of access has not occurred.²⁹⁵ This argument rests on two assumptions about the alleged due process violation. The first assumption is that the citizen has to look to action by the state in the management of its libraries and offices for a due

SPECIFYING ENGINEER, Summer 2002, at 6.

²⁹² See, e.g., *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791, 806 (5th Cir. 2002); *County of Suffolk v. First Am. Real Estate Solutions*, 261 F.3d 179, 194-95 (2d Cir. 2001); *Bldg. Officials and Code Adm'r v. Code Tech., Inc.*, 628 F.2d 730, 734-37 (1st Cir. 1980).

²⁹³ See cases cited *supra* notes 271 and 274.

²⁹⁴ See *Veeck*, 293 F.3d at 802; *County of Suffolk*, 261 F.3d at 195.

²⁹⁵ A telling example illustrates some of the potential problems with the due process argument. A colleague recently sought permission from the American Bar Association ("ABA") to reprint fifteen provisions from the ABA's Model Rules of Professional Conduct for use as teaching materials in an overseas summer program. She received a letter denying permission. The letter explained the denial in terms of "the policy of the ABA and its Center for Professional Responsibility not to permit the reproduction of more than 25% of the entire texts of publications it is selling itself." Letter from ABA (April 28, 2003) (on file with the author). The letter also explained that "these publications are valuable sources of revenue for the ongoing services of the Center in promoting professional standards in the fields of legal practice. ABA editions in attractive but inexpensive formats are kept up to date and discounted prices are set to make them appealing for group uses." *Id.* Interestingly, in light of the business model proposed by the majority opinion in *Veeck*, the letter indicated that permission could not be granted "to reprint just the black letter Rules without the accompanying comments and comparisons." *Id.* Eventually, my colleague received permission from the ABA for reprinting the desired materials gratis.

process violation. The private drafting organization is not the state for due process purposes, and is therefore absolved. The second assumption is that citizens do have access because the market will provide the code to public entities, who make the decisions about access to citizens, or to those citizens who are willing to pay for copies of the code. In effect, there is a notion of market due process that removes any due process concerns from recognizing copyright in the model code.

I have made the argument against copyright in model codes elsewhere, and here I will just summarize the problems with this "market due process" argument.²⁹⁶ Privatizing law making ignores the values of deliberative democracy. Even for technical matters, law making better represents the interests of the public if done through an open process of discussion and sharing of ideas. The pursuit of these values does not mean that a legislature cannot rely on private organizations for input, or even for draft model codes. But turning the drafting process into a market one potentially turns a democratic process into a discrete transaction between a demander of laws (the legislature) and a supplier of laws (the drafting organization). Furthermore, the financing of law making through public means also undermines democratic values. In most private code drafting cases, the organization allows the state to use the model code without charge. The organization finances its enterprise through sales of the draft code to libraries, law firms, and other interested parties. In other words, general tax revenues are not used to fund law making. To the extent that tax revenues serve to maintain government accountability, the power over the purse strings is lost in the process. Although citizens could still hold governments accountable by voting with their feet, this mechanism is not likely to be effective. In conclusion, copyright law should be applied to limit this practice and correct its abuses.

I originally made the above argument outside of the context of the privatization model I am espousing in this Article.²⁹⁷ The privatization thesis only strengthens my claim. First, copyright in the code drafting context is being used not to protect individual liberties, but to protect the rights of a group that is comparable to the Stationer's Company, establishing a troubling parallel with copyright's early history. Private code drafting organizations are largely professional associations, akin to guilds. Therefore, the argument that copyright protects liberty interests in speech and

²⁹⁶ See Shubha Ghosh, *Manufacturing Law* (unpublished manuscript, on file with the author).

²⁹⁷ *Id.*

cultural production seems inapposite here. Second, copyright permits the devolution of an activity that is central to the state's police power. Private code drafting is different from the state commissioning a song or a mural, and allowing the creator to maintain a copyright. In the second example, the state has privatized one strand of its power. With private code drafting, the state has privatized the key tool it has for exercising its power – the drafting of legislation. The devolution is analogous to the issues raised by the privatization of prisons that I discussed in Part I. Through privatizing prisons, the state devolves a part of its law enforcement power. Through privatizing legislation, the state devolves a central function necessary for executing all other powers. Such a devolution requires special scrutiny.

By placing copyright into a privatization framework, my goal is to revive the importance of public values in copyright law. Once copyright is understood as a devolution of a public function, the public dimension of copyright should be apparent. In resolving the model code cases, courts have recognized these public values (although, as I have argued elsewhere, perhaps not in the most effective manner). For example, the Ninth Circuit held that the American Medical Association (“AMA”) could copyright its standardized taxonomy for health care procedures adopted into federal Medicare and Medicaid regulations. However, the court also limited the ability of the AMA to enforce its copyright against a health maintenance organization that adopted the taxonomy in order to comply with federal law.²⁹⁸ The court viewed such enforcement as copyright misuse, or an inequitable extension of the copyright owner's right.²⁹⁹ In reaching its decision, the court recognized the public values in having a taxonomical system that can be shared by health care providers and managers.³⁰⁰ The First Circuit protected public values when it denied copyright in a building code drafted by a private organization because the drafters did not need the incentive to draft the code, and because there were potentially serious due process concerns with access to the code if the copyright was recognized.³⁰¹

²⁹⁸ *Practice Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516, 517 (9th Cir. 1997).

²⁹⁹ Although the Ninth Circuit had found that the coding system was protected under copyright law, the court decided not to enforce the copyright because of a finding that AMA, as copyright owner, had misused its copyright “by licensing the [the coding system] to HCFA [Health Care Financing Administration] in exchange for HCFA's agreement not to use a competing coding system.” *Id.* at 520.

³⁰⁰ *Id.*

³⁰¹ *See Bldg. Officials and Code Adm'r v. Code Tech., Inc.*, 628 F.2d 730 (1st Cir. 1980).

The Fifth Circuit has preserved public values through copyright in the most novel way by denying copyright to a model code when the code is enacted into law. Once the model code is enacted into law, the enacted law is now owned by the citizens who effectively "author" the law through the legislature.³⁰² The "citizen-author," as owner of the law, controls the law collectively, meaning that the law is in the public domain. I have criticized this reasoning (but not the conclusion) of the Fifth Circuit extensively in a separate article.³⁰³ Whatever the problems with the application of the concepts of authorship and ownership to law, the Fifth Circuit's reasoning illustrates how public values can be realized in copyright. By taking enacted law out of copyright altogether, the court recognizes the public need to use the law. Through the language of the "citizen author," the court explicitly recognizes the public functions of law making that are at stake in the case. The "citizen author" concept echoes the sovereign's prerogative to grant patents over law books which defeated private rights of authors.³⁰⁴

Note that recognizing public values in copyright does not mean making all works public. The Fifth Circuit acknowledges private incentive and financing issues when it concludes that even though the private code drafters lose the copyright in the model code when it is enacted, they retain a copyright in notes, comments, and other supplementary materials to the code. These "value added" items, the court reasons, can still be the source of profit.³⁰⁵ I have criticized this holding for a number of reasons, the primary one being the interdependence between enacted code and notes, both for interpretive purposes and in the enactment process.³⁰⁶ The Solicitor General, who was asked to submit a brief on

³⁰² *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791, 798-99 (5th Cir. 2002).

³⁰³ See Ghosh, *supra* note 25.

³⁰⁴ See *supra* note 168 and accompanying text.

³⁰⁵ *Veeck*, 293 F.3d at 806.

³⁰⁶ The status of legislative history and notes is not addressed by the court and is an open and pressing issue. If the legislature enacts SBCCI's notes or comments as part of its legislative history, it is far from clear whether the notes or comments fall into the public domain under the same logic as applied to the language of the code. The other possibility is that the notes or comments retain their copyright because they have a different status from the language of the code that is the product of the citizen author. Complicating this analysis are the arbitrary lines often drawn by legislatures among text, notes, and legislative history. If a legislature, in enacting a model code, decides to place a provision of the code in the notes or in the legislative history, does it retain its copyright status? In other words, what exactly is the law enacted by the legislature and drafted by the citizen author? As one commentator has stated, the decision's "limitation is that it may force subsequent courts into a rhetorical debate about the metes and bounds of the law." Brett I. Miller, *Can Public Law Be Private?*, PA. L. WKLY., October 21, 2002, at 12. I want to thank my colleague Ken Joyce, who has worked on legislative drafting, for pointing out these concerns. For authoritative discussions of the legislative process and the

the case as part of the Supreme Court's review of the certiorari petition filed in the case, concluded that financial incentives still exist because:

professionals in the fields affected by particular standards and codes may have ample incentive to continue to buy the "official" sets of standards notwithstanding the potential availability of other, unofficial editions. Even if profits from sales of copyrighted materials were reduced, professionals in the field and others may have many reasons to ensure that broadly applicable standards and codes of high quality and integrity remain available.³⁰⁷

In other words, the loss of copyright in the draft code when enacted does not eliminate a market for the code drafter's work. This pragmatic consideration of market effects allows for the accommodation of public values in copyright without loss of private incentive through the destruction of a private property interest.

The model code cases illustrate two aspects of my privatization thesis. The first is the thesis itself, that copyright is a privatization of a government function. In the model code cases, copyright is used to privatize the government function of law making by allowing private code drafters to finance the creation of critical public infrastructure – legal code. However, once the use of copyright as a means of privatization is recognized, it is possible to interpret copyright law in order to preserve the public values being devolved. Although two courts (the Second and the Ninth Circuits) have explicitly recognized copyright in model codes and standards, one of these two (the Ninth Circuit) placed limits on the enforcement of the copyright. Two other courts have concluded that copyright does not exist in model codes at all. The decisions of these three courts serve as examples of how public values can be preserved through interpretation of copyright law when copyright is being used to devolve a government function.³⁰⁸

different treatments of text and notes across states, see ELLEN W. GIBSON, *NEW YORK LEGAL RESEARCH GUIDE* 1.65-1.90 (2d ed. 1998); DANIEL W. MARTIN, *HENKE'S CALIFORNIA LAW GUIDE* 61-90 (5th ed. 1999); LAUREL WENDT, *ILLINOIS LEGAL RESEARCH MANUAL* 95-103 (1988).

³⁰⁷ Brief of Amicus Curiae the United States at 18-19, *Veeck*, 293 F.3d 791 (No. 02-355).

³⁰⁸ Another approach is exemplified by state legislatures dedicating state intellectual property to the public. For example, the legislature in California is considering the California Intellectual Property Rights Act, under which certain state-owned intellectual property would be dedicated to the public domain. Assem. 1616, 2003-2004 Reg. Sess. (Cal. 2003).

B. Does an Author Exist?: Copyright and Faith-Based Initiatives

Copyright has also played a role in intra-religious disputes over access to religious texts allegedly protected by copyright.³⁰⁹ The application of the privatization thesis to these cases raises issues of the proper relationship between the state and religious organizations, as well as the proper place of copyright in mediating that relationship.

According to my thesis, copyrighting a church's religious texts entails the devolution of a government function to a religious organization. The difficult question is the identification of the government function that is being devolved. There are two potentially overlapping theories of what government functions are being devolved. The first theory focuses on the role of copyright in facilitating faith-based initiatives. The second, and more controversial, recognizes religious artifacts as cultural products that are within the domain of the state.

The rhetoric of faith-based initiatives envisions the execution of several government functions, such as education, redistributive income policies, and drug rehabilitation, through religious organizations.³¹⁰ Copyright's role in the propagation of faith-based initiatives may seem tenuous until one recognizes that the sale of religious materials, including texts and icons, is an important source of revenue for many religious organizations.³¹¹ Marketing of these materials is facilitated by copyright law. The lawsuit brought by The Gideons International, Inc., even though based in a theory of trademark infringement, indicates the role of intellectual property in creating valuable assets that religious organizations can exploit for the financing of their activities.³¹² The Gideons International, producers of the famous Bibles, successfully sued Gideon 300 Ministries, a non-profit engaged in feeding the indigent and homeless, for unauthorized use of the name "Gideons." In bring-

³⁰⁹ See Cotter, *supra* note 26, at 325 (pointing out that the invention of printing press influenced both religious history and copyright development).

³¹⁰ See MINOW, *supra* note 20, at 68-73 (discussing welfare reform and faith-based initiatives); John J. DiIulio, Jr., *Government by Proxy: A Faithful Overview*, 116 HARV. L. REV. 1271, 1276-82 (2003) (discussing non-profits, including religions, and proxy government); Minow, *supra* note 27, at 1240 (noting the increasing use of private organizations to achieve public ends); Saperstein, *supra* note 27, at 1355-58 (examining the risks and alternatives to public-religious joint ventures); Sullivan, *supra* note 27, at 1399 (setting up discussion of joint ventures of religious and public-service associations).

³¹¹ For a discussion of religious materials, see *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). For an excellent discussion of the new religion and the connections among the new religion, commerce, and copyright, see Rebecca R. French, *Shopping for Religion: The Change in Everyday Religious Practice and Its Importance to the Law*, 51 BUFF. L. REV. 127, 188-92 (2003).

³¹² *Gideons Int'l, Inc. v. Gideon 300 Ministries, Inc.*, 94 F. Supp. 2d 566 (E.D. Pa. 1999).

ing the suit, Gideons International was trying to preserve the economic value of the name, an interest the court protected. Similarly, in *Worldwide Church of God v. Philadelphia Church of God, Inc.*,³¹³ the issue was the commercial value of the sacred texts of Herbert W. Armstrong, the church's founder. The ability to exploit the letters of a church's founder was also central to the dispute in *Merkos L'Inyonei Chinuch, Inc. v. John Doe Nos. 1-25*.³¹⁴ Finally, the economic value of selling photographic images of the church founder served as the basis for the lawsuit in *Self-Realization Fellowship Church v. Ananda Church of Self-Realization*.³¹⁵

Copyright arguably facilitates the privatization of the government's role in providing educational and other services. Religion, however, also can be understood as a form of cultural production.³¹⁶ This claim may be controversial because of the principle of separation of church and state embodied, precariously, within the principle of free exercise in the First Amendment of the Constitution. But the notion of the separation of religion from public, cultural, and social life has been severely criticized for leading to both a distortion of religion and "an estrangement of law from the general culture."³¹⁷ Some may counter my equating of religion with culture by arguing that modern governments do not have as one of their functions the creation of religious texts.³¹⁸ The problem with this position, however, is that the government does have the function of creating symbolic texts, whether they be monuments or coins.³¹⁹ Sometimes these symbols may have religious meanings, such as the imprinting of "In God We Trust" on coins.³²⁰ The function being devolved through copyright law ar-

³¹³ 227 F.3d 1110 (9th Cir. 2000).

³¹⁴ 172 F. Supp. 2d 383 (E.D.N.Y. 2001).

³¹⁵ 206 F.3d 1322 (9th Cir. 2000).

³¹⁶ In this regard, consider the following statement by Professor Michael Brown: "In the United States, at least, religion is arguably the final frontier of unregulated creativity." MICHAEL BROWN, WHO OWNS NATIVE ART? 40 (2003). Professor Brown, however, argues that copyright and other intellectual property laws are not adequate to deal with the complex moral and dignitary issues raised by religious texts. Although the focus of his criticism of intellectual property is in its application to aboriginal art work, his thoughts are equally applicable to other religious traditions.

³¹⁷ WINNIFRED FALLERS SULLIVAN, PAYING THE WORDS EXTRA: RELIGIOUS DISCOURSE IN THE SUPREME COURT OF THE UNITED STATES 3-4 (1994).

³¹⁸ For a discussion of the principle of separation of church and state, see LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 144 (1994). For language of the separation between church and state in judicial opinions, see *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). For an analysis of the problem of symbolic endorsement of religion, see *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 627 (1989).

³¹⁹ See discussion of government functions, *supra* Part I.B.

³²⁰ See *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984) (describing the use of "In God We Trust" on U.S. currency).

guably is the creation of cultural symbols as part of the cultural infrastructure that governments are understood to provide.³²¹ This explanation is troubling because while we do recognize that the government may in some instances include religious symbols as part of the cultural infrastructure, the creation of religious texts seems outside the government's domain.³²² The King James Bible project could hardly have been undertaken by a democratic, religiously plural, or secular government. While religious texts do serve secular purposes as cultural symbols, they are clearly more than that.

The wall between church and state, however, is not impregnable. According to Justice Story, the purpose of the religion clauses "was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment."³²³ Articulating a Hobbesian notion of the state, this view of the secular sovereign has taken several different forms. One view, associated with Roger Williams, depicts the separation as protecting the church from the state.³²⁴ Conversely, Thomas Jefferson saw the separation as necessary to protect the state from the church.³²⁵

Alongside this view of state and religion rooted in Hobbes is another tradition rooted in Adam Smith, who recognized the importance of religious instruction "to render people good citizens in this world, as to prepare them for another and a better world in a life to come."³²⁶ The fostering of religious instruction required the government both to leave religion alone and to prevent encroachment of one religion upon another.³²⁷ Consistent with Smith's

³²¹ See discussion *supra* Part I.A.

³²² This position is based on either a strict separation position of a wall between church and state, or a neutrality position, limiting the government's ability to take sides in religious debates. See Philip Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961) (attempting to measure cases against a neutral principle); Douglas Laycock, *Formal, Substantive and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990) (defining formal and substantive neutrality).

³²³ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 991 (Carolina Academic Press 1987) (1833).

³²⁴ Roger Williams, *Roger Williams to the Town of Providence*, in 5 THE FOUNDERS' CONSTITUTION 50, 50-51 (Philip B. Kurland & Ralph Lerner eds., 1987); see also LLOYD BURTON, *WORSHIP AND WILDERNESS: CULTURE, RELIGION, AND LAW IN THE MANAGEMENT OF PUBLIC LANDS AND RESOURCES* 100 (2002) (citing Roger Williams as the source of the principle of a wall of separation between the church and the world).

³²⁵ See THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, 157-61 (William Peden ed., Univ. of N.C. Press 1955) (1784) (urging stronger assurances of religious freedom than Virginia then had).

³²⁶ See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 788 (R.H. Campbell & A.S. Skinner eds., Oxford Univ. Press 1976) (1776).

³²⁷ *Id.*

view, Madison recognized “a window within the wall” between church and state.³²⁸ Madison recognized the importance of religion in American life and framed the problem in terms of how religious and governmental institutions could coexist. The individual citizen, according to Madison, had duties and obligations to his faith and to civil society:

Before any man can be considered as a member of Civil Society, he must be considered as subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.³²⁹

Religion served as a basis for associations that existed within the state, but was to be kept at arms’ length from government institutions. These understandings of the wall between church and state recognize the coexistence between religious and other institutions. From this coexistence flows the proposition that religion is one aspect of culture. In fact, as Professor Hatch has documented, an important dimension of print culture in the early American republic was the propagation of religious texts as a means of challenging traditional religious hierarchies.³³⁰ Freedom of press, of speech, and of religion are intimately interconnected.

Although modern democratic governance would not countenance a government project such as the King James Bible, religion is recognized in democratic government in other, more subtle ways. While Professor Stephen Carter mourned the devaluation of religion in the public sphere in *The Culture of Disbelief*,³³¹ he acclaims religion’s role as a counter to “the dominant forces in the culture.”³³² For Carter, religion is the subculture that is most capable of resisting dominance by the majority.³³³ Precisely because of religion’s power to facilitate resistance, Carter extols respect for

³²⁸ BURTON, *supra* note 324, at 102.

³²⁹ James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 5 THE FOUNDERS’ CONSTITUTION, *supra* note 324, at 82.

³³⁰ See HATCH, *supra* note 218, at 125-26 (discussing the nineteenth century explosion of religious-topic popular printed material).

³³¹ STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 43-44 (1993) (arguing that religion domesticated by politicians becomes trivialized).

³³² STEPHEN L. CARTER, GOD’S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS 171 (2000).

³³³ See *id.*

the autonomy of religious communities as a means to further dissent, and to stimulate political and social progress, the Civil Rights movement serving as his primary example.³³⁴ But the Civil Rights movement serves as only one example of religion's role in shaping culture. Theologian Martin L. Marty talks about the importance of religion in forming a rounded participatory citizen, one who is "mobilized by faith."³³⁵ Professor Lloyd Burton documents the play of religion in public lands management in the United States.³³⁶ His examples range from the Tenth Circuit's disposition of a case involving commercial use of the Devils Tower National Monument in favor of Native American tribes and against commercial interests,³³⁷ to the issues raised by preservation of the Bighorn Medicine Wheel for the United States Forest Service.³³⁸ Furthermore, religion has had important influences on the emergence of commercial culture, in shaping the landscape of literary marketplaces through censorship campaigns,³³⁹ in defining the politics and culture of the urban landscape in the post-World War II United States,³⁴⁰ and in developing the market for food and religious lifestyles.³⁴¹ Finally, looking beyond the United States, appeal to religion has become an important prong of economic development strategy as the World Bank has moved to address the concerns of religious groups in developing countries that challenge policies of austerity and free markets.³⁴²

I have made the case for treating religion as a type of culture for the purposes of my privatization thesis. But characterizing copyright in religious texts as a form of privatization requires deal-

³³⁴ STEPHEN L. CARTER, *THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY* 141-42 (1998).

³³⁵ MARTIN E. MARTY, *POLITICS, RELIGION, AND THE COMMON GOOD: ADVANCING A DISTINCTLY AMERICAN CONVERSATION ABOUT RELIGION'S ROLE IN OUR SHARED LIFE* 55-72 (2000).

³³⁶ BURTON, *supra* note 324, at 32-34 (connecting land-management issues to American Indian spiritual traditions).

³³⁷ *Id.* at 123-44 (discussing *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814 (10th Cir. 1999)).

³³⁸ BURTON, *supra* note 324, at 162-66 (discussing *Wyo. Sawmills, Inc. v. U.S. Forest Serv.*, 179 F. Supp. 2d 1279 (D. Wyo. 2001)).

³³⁹ P.C. Kemeny, *Banned in Boston: Commercial Culture and the Politics of Moral Reform in Boston During the 1920s*, in *FAITH IN THE MARKET: RELIGION AND THE RISE OF URBAN COMMERCIAL CULTURE* 133, 148 (John M. Giggie & Diane Winston eds., 2002).

³⁴⁰ Melani McAlister, *Nation Time: Black Islam and African American Cultural Politics, 1955-1970*, in *FAITH IN THE MARKET: RELIGION AND THE RISE OF URBAN COMMERCIAL CULTURE*, *supra* note 339, at 199, 202.

³⁴¹ Etan Diamond, *Beyond Borscht: The Kosher Lifestyle and the Religious Consumerism of Suburban Orthodox Jews*, in *FAITH IN THE MARKET: RELIGION AND THE RISE OF URBAN COMMERCIAL CULTURE*, *supra* note 339, at 227, 233-34.

³⁴² Gregory Baum, *Solidarity with the Poor*, in *THE LAB, THE TEMPLE, AND THE MARKET: REFLECTIONS AT THE INTERSECTION OF SCIENCE, RELIGION, AND DEVELOPMENT* 61, 74-77 (Sharon Harper ed., 2000).

ing with the Constitutional limitations on the state's regulation of religion.³⁴³ The Constitutional protections for religion should inform the public values of copyright when religious texts are at issue.

The Supreme Court's most recent pronouncement of free exercise is one weakly protective of religious practices.³⁴⁴ In *Employment Division v. Smith*, the Court held that the government need not create an exemption for religion from law that was generally applicable and neutrally applied.³⁴⁵ However, exemptions will be required if the law is designed to target a specific religious practice.³⁴⁶ The Establishment Clause jurisprudence has been fairly muddy, with the *Lemon* test being the principal standard.³⁴⁷ Under the *Lemon* test, a law does not violate the Establishment Clause if it has a secular purpose and a secular effect, and does not involve excessive entanglement between the state and the religious organization.³⁴⁸ The test has an inherent tension between its second and third elements: Ensuring that a law has a secular effect often will require the state to become increasingly entangled with the religious organization.³⁴⁹ For example, in ensuring that subsidies to private and public schools do not unduly benefit religious schools, the state will have to monitor how the subsidies are used.³⁵⁰

Because of these difficulties, the Court has also developed alternative tests for violations of the Establishment Clause that are based on whether individuals are being coerced into participation in religious practices and beliefs.³⁵¹ This test has had its most im-

³⁴³ For discussion of the tension between the Free Exercise Clause and the Establishment Clause, see Sullivan, *supra* note 27, at 1402; Kathleen M. Sullivan, *Justice Scalia and the Religion Clauses*, 22 U. HAW. L. REV. 449 (2000) (questioning the effect of privatization on religion); Michael W. McConnell, *Religious Freedom at the Crossroads*, 59 U. CHI. L. REV. 115 (1992) (calling the Warren and Burger courts' work in these areas confused and often counterproductive).

³⁴⁴ *Employment Div. v. Smith*, 494 U.S. 872 (1990) (allowing denial of unemployment benefits to workers fired for sacramental use of peyote).

³⁴⁵ *Id.* at 879.

³⁴⁶ *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546-47 (1993) (holding that ordinances forbidding animal sacrifice fail tests of neutrality, general applicability, compelling government interest, and narrow tailoring to that interest).

³⁴⁷ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

³⁴⁸ *Id.* at 612.

³⁴⁹ See, e.g., Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 VAND. L. REV. 1335 (1995) (focusing on the problem of inadvantage).

³⁵⁰ See *Mitchell v. Helms*, 530 U.S. 793, 795-96 (2000) (discussing divertibility of aid to religious ends).

³⁵¹ See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302-03 (2000) (holding that public school prayer at football game impermissibly imposes upon the student body a majoritarian election on the issue of prayer).

portant applications to the question of prayer in public schools.³⁵² The most recent Supreme Court ruling on the Establishment Clause was on the constitutionality of school vouchers, which the Court held did not violate the Establishment Clause because the state, through vouchers, financed private citizens, who in turn decided to spend the grant on either religious or secular education.³⁵³ The decisions of the private citizens served as a circuit breaker, preventing an unconstitutional entanglement between the church and the state.³⁵⁴

When a court has to decide which sect has rights in the copyrighted text, the court is in a position of being seen as endorsing one side of a religious dispute. General jurisprudential principles require courts hearing an intra-sectarian dispute to decide the case on legal principles, avoid consideration of internal religious doctrine, and defer to internal church hierarchy on questions of doctrine.³⁵⁵ Copyright provides legal principles on how to allocate property rights that for the most part allow a court to avoid questions of internal church doctrine.³⁵⁶ For example, in a recent case involving ownership in the writings of an Indian swami who had founded a church in the United States, the Ninth Circuit based its decision on the doctrine of work for hire to determine whether the Swami had created the writings as part of his employment with the church.³⁵⁷ In other cases, courts look to the doctrines of authorship and fair use to settle the dispute, and thus questions of internal doctrine are avoided.³⁵⁸

Even if the court looks to secular copyright law to resolve intra-sectarian disputes, the problem remains that the court must decide between two competing religious groups. If copyright is interpreted to mean that Church A has no rights in the text, this decision arguably constitutes both a violation of the free exercise rights of the members of Church A, or an establishment of Church

³⁵² See *Lee v. Weisman*, 505 U.S. 577, 584-85 (1992) (affirming that no holding by the Court suggests that a school can persuade or compel a student to participate in a religious exercise).

³⁵³ *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (stating that the Establishment Clause question of whether Ohio is coercing parents into sending their children to religious schools must be answered by evaluating all options).

³⁵⁴ *Id.*

³⁵⁵ See *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1871) (holding that a civil court is not to consider church doctrine in a property dispute).

³⁵⁶ See *Jones v. Wolf*, 443 U.S. 595, 603 (1979) (concerning ownership of church property after schism in the congregation).

³⁵⁷ *Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 206 F.3d 1322, 1326-27 (9th Cir. 2000) (finding that the writings in question were not "works for hire" due to the lack of evidence of the church's supervision or control of the work).

³⁵⁸ See *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1115-20 (9th Cir. 2000).

B. Most scholars would agree that copyright is not facially unconstitutional on either Free Exercise or Establishment Clause grounds.³⁵⁹ Copyright is a generally applicable law and would pass muster under *Smith*. Furthermore, copyright has a clear secular purpose and effect, and even though specific cases may require judicial entanglement into the workings of a religious organization, this entanglement most likely would not be excessive, especially in light of the general principle of deciding intra-religious disputes without reference to internal doctrine. Therefore, copyright on its face passes the *Lemon* test.

But in its applications, the constitutional values should play a role in the adjudication of these disputes, especially if copyright is understood as a privatization of a government function.³⁶⁰ In other words, under my privatization thesis, courts should acknowledge the public values underlying copyright and not simply view copyright as the enforcement of private rights against the world. Since the religious text cases implicated values of the Free Exercise and Establishment Clauses, these values should be part of how we apply copyright law to these cases. Therefore, even though copyright, understandably so, does not violate either the Free Exercise or the Establishment Clause, the principles underlying these clauses should inform how we interpret copyright law and the way in which it carries out the government functions of cultural production.

What are the values of free exercise and establishment? The answer depends on how one construes the relationship between religion and state. Professor Kathleen Sullivan has suggested an extremely useful and practical conceptualization of this relationship based on four identifiable functions of religion.³⁶¹ First, religion can be viewed as a quasi-government, carrying out many of the functions of secular states.³⁶² Under this view, free exercise should be weak to prevent balkanization, and establishment should be strong to maintain neutrality and reduce resentment among competing religious entities.³⁶³ Second, religion can be viewed as a form of private expressive association, such as a university or a country club.³⁶⁴ Under this view, free exercise and establishment should both be strong, requiring the recognition of many religious practices and beliefs without the sponsorship of any particular re-

³⁵⁹ Cotter, *supra* note 26, at 337, 366.

³⁶⁰ *Id.* at 367-68.

³⁶¹ Sullivan, *supra* note 27, at 1401-03.

³⁶² *Id.* at 1403-05.

³⁶³ *Id.* at 1404-05.

³⁶⁴ *Id.* at 1405-07.

ligion.³⁶⁵ Third, if religion is seen as a discrete and insular minority, often existing in opposition to the state, then free exercise should be strong to protect religious practices, and establishment should be weak to allow for secular accommodation of religious activities.³⁶⁶ Fourth, and last, religion may be seen as just another interest group, implying that free exercise and establishment should both be weak because religion, like all other interests, should protect itself through market and political means.³⁶⁷ This last view, Professor Sullivan concludes, is the view adopted in current constitutional law jurisprudence.³⁶⁸

But the fourth view is not appropriate for copyright law. When we deal with religion in the context of copyright, we are not dealing with just another interest group. We are treating religion as a private expressive association whose key form of expression is the religious text.³⁶⁹ Professor Sullivan's schema suggests that copyright should be based on strong Free Exercise and strong Establishment Clause values when applied to intra-sectarian disputes. What this means is that courts, in deciding copyright cases between competing religious users of expression, should be careful in not picking sides and disenfranchising one group from the practice of their beliefs. This underlying principle is consistent with the third function of government in cultural production, the distributive goal of ensuring that minority voices are heard and expression of minority culture is not disadvantaged. The other two functions are also implicated. For in ensuring that religious groups are not disenfranchised, courts should be aware that by the copyright grant, religious practices are being financed and cultural infrastructures for the practice of one's beliefs are being created. These are the public values that my privatization thesis, when understood in the context of religion and the law, would seek to endow in copyright law.

The actual case law provides some examples of successes and some examples of failures under the criteria I have developed. For example, in analyzing authorship questions involving religious texts, courts have rejected the argument that since the source of the text is God, there is no human author and therefore the text is not

³⁶⁵ *Id.* at 1406-07.

³⁶⁶ *Id.* at 1408-09.

³⁶⁷ *Id.* at 1409-11.

³⁶⁸ *Id.* at 1411.

³⁶⁹ *Id.* at 1405; see French, *supra* note 311, at 135 (discussing religion as a means of expression and culture); see also Rebecca French, *From Yoder to Yoda: Models of Traditional, Modern, and Postmodern Religion in U.S. Constitutional Law*, 41 ARIZ. L. REV. 49, 81 (1999) (discussing the Supreme Court's treatment of postmodern religious groups under the First Amendment).

subject to copyright.³⁷⁰ This argument has been made a number of times by defendants who seek to dismiss a copyright infringement claim brought by the dominant sect seeking to limit access to the work by the opposing sect. While the argument is clever and has some appeal, it is misguided for a number of reasons.

First, by denying copyright altogether in a religious text, to adopt a notion of the “divine author,” analogous to the “citizen author” in the Fifth Circuit,³⁷¹ is to deny the religious organization any ability to manage the religious text. In other words, to deny rights to anyone is to allow everyone to potentially copy, alter, distribute, and market the text. Such loss of control by placing the religious text in the public domain potentially diminishes the secular value of the text to all members of the religious group, however divided they may be as to the correct ownership and proper use of the text.

Secondly, assessing the validity of the argument may force the court to investigate and become entangled with religious doctrine about human agency and divine will. Avoiding such entanglement through a rule that authorship is satisfied through traditional copyright doctrine – in other words, that it is a human person from whom the written text originates – seems a safer alternative. Professor Thomas Cotter has suggested that for issues of authorship in religious texts, courts should adopt a default rule of non-copyrightability (instead of the current presumption of copyrightability) in order to respect religious beliefs about divine origin and human agency.³⁷² I agree with Professor Cotter’s concerns about free exercise values, but think there are better ways to address these values, as I discuss below. In the context of authorship, I am not convinced that his proposal would address the dangers of entanglement, and may in fact increase them. The vacuum created by removing the presumption of copyright and the attendant notions of authorship would be filled by the pertinent assumptions of the particular religious system regarding the origins of the text. Law would essentially be replaced with religious doctrine, violating an important foundational principle in religious jurisprudence that courts avoid doctrinal disputes. The better approach is

³⁷⁰ See, e.g., *Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd.*, No. 96 Civ. 4126 (RWS), 56 U.S.P.Q.2d 1680, 2000 WL 1028634 (S.D.N.Y. July 25, 2000) (holding that a religious textbook was protected by copyright and was not a divine revelation), *rev’d on other grounds*, 288 F. Supp. 2d 544 (2003); *Cummins v. Bond*, 1 Ch. 167 (1927) (holding that a text written from psychic séances was a copyrighted book); *Urantia Found. v. Maa-herra*, 895 F. Supp. 1337 (D. Ariz. 1995) (holding that a book distributed as a divine revelation was protected as a literary work).

³⁷¹ *Veck v. S. Bldg. Code Cong. Int’l*, 293 F.3d 791, 799 (5th Cir. 2002).

³⁷² Cotter, *supra* note 26, at 343-44.

to recognize that if principles of authorship are held to be so offensive to religious beliefs concerning origins, then the disputing parties may choose to simply not have the matter resolved through copyright doctrine and the federal courts. The plaintiff by bringing the suit is effectively denying divine authorship, and presumably is acting in accordance with its beliefs about the text. However, any evidence that the plaintiff has previously asserted that the text is not of human authorship would be a basis for copyright estoppel, allowing the court to dismiss the suit without entering into the doctrinal dispute over authorship.³⁷³

My approach to authorship may seem unaccommodating to religious belief, but in fact I am seeking to avoid the problem of turning a courtroom into a forum for doctrinal debates that are outside the judge's competence. Moreover, free exercise values and establishment concerns are arguably better addressed through copyright doctrines, such as fair use, that are intended to protect the rights of dissident users. On this point, courts have shown mixed success. The issue of the right to publish official and secret church documents has been the subject of several cases, with the courts finding fair use in two cases³⁷⁴ and a triable issue of fact in another.³⁷⁵ In some of these cases, the church documents were leaked to the publisher or distributed on a web site by church dissidents. The conflict between the church authority and the dissidents offers an example of the strong Free Exercise and Establishment Clause values I advocate here. By protecting the right of the dissident to use the sacred text, the court created an appropriate exemption from copyright, protecting Free Exercise Clause values and avoiding the endorsement of the dominant religious group against the voice of dissidents, protecting Establishment Clause values.

The Ninth Circuit, however, in the well-known *Worldwide Church of God v. Philadelphia Church of God, Inc.*,³⁷⁶ illustrates an approach that is antithetical to Free Exercise and Establishment Clause values. The case involved the teachings of Herbert Armstrong, a minister who founded a church called the Worldwide Church of God in California in the 1950s. His writings contained racist and other offensive statements that the Church expurgated in

³⁷³ See, e.g., *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 104 (9th Cir. 1960); see also Cotter, *supra* note 26, at 345-47 (discussing copyright estoppel).

³⁷⁴ *Religious Tech. Ctr. v. F.A.C.T.NET, Inc.*, 901 F. Supp. 1519, 1523-26 (D. Colo. 1995); *Religious Tech. Ctr. v. Lerma*, 897 F. Supp. 260, 263-66 (E.D. Va. 1995).

³⁷⁵ *Religious Tech. Ctr. v. Netcom On-Line Communications Servs., Inc.*, 907 F. Supp. 1361, 1380-81 (N.D. Cal. 1995).

³⁷⁶ 227 F.3d 1110 (9th Cir. 2000).

editions of the text published after Armstrong's death. A dissenting faction of the church wanted to use the unexpurgated version and broke away. In their practice, the dissenting faction copied and used the unexpurgated version, creating the basis for a copyright lawsuit. The Ninth Circuit ruled against the dissenters, finding that this use was not a fair use. Central to the Ninth Circuit's analysis were the findings that the dissenters had copied the entire text without transforming it, and that the use by the dissenters harmed the ability of the Church to sell the text.

Several things are questionable about this analysis. First among them is the Ninth Circuit's underestimation of the critical use of the text by the dissenting wing of the church. The relevant fact, to the court, was the wholesale copying of the text without the addition of any new or valuable textual material, either in the form of notes, comments, or criticisms.³⁷⁷ The critical use of the text, however, was the placing of the text in a different religious and interpretative context. In *Sony Corp. of America v. Universal City Studios, Inc.*, by way of contrast, the Supreme Court recognized that the wholesale copying of a broadcast program that permitted the viewing in a different context (what is referred to as *time shifting*) was fair use.³⁷⁸ Furthermore, in *Hustler Magazine, Inc. v. Moral Majority, Inc.*, the Ninth Circuit recognized that wholesale copying is fair use if necessary to criticize or comment upon the work.³⁷⁹ Either of these cases would apply to the facts of *Worldwide Church of God*. Instead, the Ninth Circuit analyzed the wholesale copying outside the context in which the copies were used.

Secondly, the Ninth Circuit framed the case as a dispute between competitors in the marketplace as opposed to one between two religious believers. The market analysis, as is often thought to be the case in copyright cases, may have been crucial to the outcome.³⁸⁰ The potential lost revenue from sales and the ability of the Church to alter and create derivative works from the Bible were what concerned the court.³⁸¹ The problem is that in analyzing the dispute solely in market terms, the court arguably disenfranchises a religious group whose practices and beliefs required the use of the unexpurgated text. Of course, after the decision against them, the dissenters could seek to license the text or obtain permission to use the unexpurgated text. But the facts of the case suggest

³⁷⁷ *Id.* at 1117-19.

³⁷⁸ 464 U.S. 417, 442-43 (1984).

³⁷⁹ 796 F.2d 1148, 1153 (9th Cir. 1986).

³⁸⁰ *Worldwide Church of God*, 227 F.3d at 1120.

³⁸¹ *Id.*

that the Church was not inclined to grant such license or permission. Given the context, the court erred in analyzing the case as largely a market issue, rather than as an issue of conflicting religious belief.

The analysis of *Worldwide Church of God* would have been better informed by recognizing the arguments made here. Copyright is a means of privatizing a government function. But the privatization thesis is not as easy to apply in the religious text cases as it is in the model code cases because of the concerns of the proper relationship between the church and the state. This complication means that courts have to think differently about the public values imbuing copyright disputes over the use of a religious text. Public values in cases involving copyright and religion include the protection of religious voice and of beliefs, both across and within religious systems. The *Worldwide Church of God* decision is a disappointment on these grounds. Instead of protecting religious pluralism, the Ninth Circuit's decision privileged one side in a religious dispute, allowing the victor to censor portions of a religious text and dissident voices. The result presents uncomfortable parallels to copyright's early history as a tool of censorship, and hinders the search for public values in copyright's present.

C. The DMCA as Privatization of Information Regulation

The Digital Millennium Copyright Act, which was enacted in 1998 and became effective after a period of legislative and administrative review in 2000, creates a private cause of action allowing the owner of copyrighted material which is encrypted to prosecute anyone who has circumvented the encryption in order to access and make use of the material.³⁸² The act also allows the owner to prosecute anyone who traffics or distributes decryption technology.³⁸³ Furthermore, the owner is given the right to obtain a subpoena from a district court ordering an Internet service provider to disclose the names of its subscribers if the owner reasonably believes that some of the subscribers are engaged in copyright infringement on the Internet.³⁸⁴ Given the broad powers granted to private copyright owners, the act has been the subject of intense study and criticism by academics and practitioners.³⁸⁵ The concern is that the DMCA will allow digital materials and access to the

³⁸² 17 U.S.C. §§ 1201-1205 (2000).

³⁸³ *Id.* § 1201(b).

³⁸⁴ *Id.*

³⁸⁵ See sources cited *supra* note 10; LITMAN, *supra* note 8, at 171-91 (arguing that the DMCA focuses too heavily on copyright holders' rights rather than users' rights).

Internet to be controlled by completely private governance, eliminating protective doctrines like fair use, the First Amendment, and due process.

There are two schools of criticisms. The first characterizes the DMCA as a privatization of copyright.³⁸⁶ By allowing owners of copyrighted materials to prosecute purveyors and users of decryption technology, the act effectively allows owners to protect their copyright through encryption technology, reducing and possibly eliminating the need to use copyright law. Privatization, within this school of thought, has a different meaning from mine. While I am arguing that copyright is a privatization of a government function, the position I have just described sees the DMCA as a privatization of the government function of enforcing copyright law. However, the views of privatization are really indistinguishable once one recognizes that copyright law has always been a means of privatization. The DMCA allows privatization of government function through technological means. To return to the three types of government functions I described in Part I, the DMCA permits copyright owners to earn rents that finance their activities, governs the way in which digital cultural infrastructure, such as e-books and other digital media, are created, and facilitates the creation of a new national culture in the digital age.³⁸⁷ The DMCA is arguably just another example in copyright's long history of the devolution of government functions to a private right.

The second school of criticism views the DMCA as a return to the licensing statutes of England, particularly the Licensing Act of 1662, which allowed the Star Chamber to censor publications.³⁸⁸ This view is most recently expressed by Professor Ray Patterson. While the Licensing Act censored materials that were deemed "heretical, schismatical, blasphemous, seditious, and treasonable," Professor Patterson argues that the DMCA allows access to digital works to be controlled by private, for-profit licensing arrangements.³⁸⁹ This comparison, on the surface, seems to be consistent with my privatization thesis, but there is one big difference. The Licensing Act is clearly privatization because it was the crown's interest in controlling seditious speech which was carried out by devolution of the censorial power to the Star Chamber. Under the DMCA, private parties are pursuing their interests, not a govern-

³⁸⁶ See Jackson, *supra* note 10, at 609-10.

³⁸⁷ See, e.g., LACY, *supra* note 217, at 139-51 (discussing the development of printed media in light of new multimedia technologies).

³⁸⁸ See Patterson, *supra* note 10, at 39-41 (comparing the DMCA to the Licensing Act of 1662).

³⁸⁹ *Id.* at 34.

ment interest, in censoring decryption technology. Arguably, when compared with the Licensing Act, the DMCA is not privatization at all, but a statute produced by industry capture designed to protect purely private interests.³⁹⁰

There is no doubt that the DMCA vindicates the private interests of copyright holders. But as a statute that permits private control of information, the DMCA can be seen as yet another manner in which privatization has occurred. The key to the privatization characterization has to do with the continuing evolution of what constitutes copyright. As we have seen, in eighteenth and nineteenth century England, copyright was seen largely as a matter of literary property. This view continued in the United States. Recently, copyright has been extended to cultural property. What the DMCA demonstrates is that copyright, in the digital age, is about information, disembodied from artifacts like books, statues, performances, or musical scores. In the digital world, ideally, all cultural production will be digital, and culture will be disembodied information that is controlled through code. Professor Lessig has famously made this point, and it is a conception of digital culture that is shared by many, both critics and defenders of the DMCA.³⁹¹ The parallel with English licensing is perhaps stronger than Professor Patterson believes. While he seems to suggest that the DMCA is purely the protection of private interests, I am contending that the DMCA is no different from other forms of copyright that entailed a devolution of a government function in cultural production to private parties. Through licensing, the sovereign sought to censor seditious speech and sanction speech consistent with the state's views on culture and the polity. Similarly, the DMCA allows limits on decryption to protect market, digital culture as defined by the Recording Industry Association of America ("RIAA"), the motion picture industry, and other key players. The key change, however, is that culture is now in the form of disembodied information, rather than artifacts.³⁹²

I do not want to suggest that digital culture will drive out print culture. Several scholars have written about the death of print cul-

³⁹⁰ See LITMAN, *supra* note 8, at 171 (arguing that current copyright holders seek to maintain their positions with new statutes).

³⁹¹ LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 39-42 (2000); *see also* Ku, *supra* note 6 (arguing that exclusive copyrights create an economic disincentive for music creation); Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813 (2001) (arguing that the DMCA exists to protect private interests).

³⁹² For an example of the transformation of cultural artifacts into information, *see* JOHN SEELY BROWN & PAUL DUGUID, THE SOCIAL LIFE OF INFORMATION 65-89 (2000) (describing a new sociology developing around the creation, processing, and dissemination of information).

ture, and their work testifies to the exaggerated rumors of the book's death.³⁹³ But the DMCA's context is digital culture, and within the context of digital culture where all expression is pure information, understanding the DMCA requires an important modification of the privatization thesis. The reduction of culture to disembodied information creates problems because even though all culture may be a form of information, not all information is necessarily culture. William Gass's novel *The Tunnel* is a cultural artifact and it is information. But the weather report or a DNA sequence is a piece of information, but not a cultural artifact for the purposes of copyright law. However, that is precisely the problem in the digital age, which blurs the distinction between cultural artifact and information.

This blurring can be seen in the many cases involving the copyright of facts, in which the basic principle that ideas and facts cannot be copyrighted seems to have lost its bite. Digitization reduces everything from Gass's *The Tunnel* to the local weather report into a string of ones and zeros, pure information not tied to artifact. For this reason, I modify the privatization thesis slightly in the context of the DMCA. In the digital age, copyright is devolution to private parties of the government's role in the production and regulation of information. When understood this way, the DMCA can be seen as increasing the scope of government powers that have been devolved to private parties. Three cases illustrate this point: *Universal City Studios, Inc. v. Corley*,³⁹⁴ *Lexmark International, Inc. v. Static Control Components, Inc.*,³⁹⁵ and *In re Verizon Internet Services, Inc.*³⁹⁶

A pure example of cultural artifact as information is provided by movies distributed on DVDs through an encryption technology called CSS. When hackers discovered the means to decrypt CSS, through a program called DeCSS, the motion picture studios brought suit against the hackers and publishers of the decryption technology under the DMCA. The suit terminated in the Second Circuit's decision in *Corley*, which upheld the district court's grant of an injunction against the publishing and dissemination of DeCSS.³⁹⁷ What is important for the privatization thesis is how the court decided the First Amendment claims raised by the defen-

³⁹³ See, e.g., NICHOLSON BAKER, DOUBLE FOLD: LIBRARIES AND THE ASSAULT ON PAPER 131-32 (2001) (discussing efforts to digitize paper library collections).

³⁹⁴ 273 F.3d 429 (2d Cir. 2001).

³⁹⁵ 253 F. Supp. 2d 943 (E.D. Ky. 2003).

³⁹⁶ 240 F. Supp. 2d 24 (D.D.C. 2003), *rev'd*, *Recording Indus. Ass'n of Am. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 69 U.S.P.Q.2d 1075 (D.C. Cir. 2003).

³⁹⁷ *Corley*, 273 F.3d at 435.

dants. The court held that the First Amendment applied under an intermediate standard of review because the speech at issue was functional speech.³⁹⁸ The decryption program served a function; it was like instructions used to pick a lock or build a bomb.³⁹⁹ Consequently, the court applied a standard applicable to regulation of communications that are a mixture of speech and conduct to conclude that First Amendment rights were not violated.⁴⁰⁰ The motion picture studios could enjoin the distribution of DeCSS.

There is no doubt that the *Corley* decision resulted in censorship of information. The key is that the court viewed the communication of DeCSS to be different from pure political or artistic speech that the court recognized would obtain strong protection. The First Amendment, as the court emphasizes, protects speech as information, and information falls under different categories for First Amendment purposes, such as political, artistic, expressive, commercial, and functional.⁴⁰¹ What is striking about the decision is the reduction of cultural expression to different grades of information, illustrating my argument that culture has been transformed into information. Although the court suggests that the equation of culture and information has always been a part of First Amendment jurisprudence, digitalization has been a catalyst for the transformation.⁴⁰²

While the *Corley* case is an example of how culture becomes information under the DMCA, *Lexmark* illustrates how market privatization is at the heart of the DMCA. The case involved a suit brought by the manufacturer of printer and toner cartridges against a manufacturer and distributor of refurbished toner cartridges designed to operate on the plaintiff's printers. The DMCA was implicated because the refurbished toner cartridge contained a chip that permitted the circumvention of a program embedded into the printer that enabled the operation of toner cartridges made only by the printer manufacturer. Effectively, the printer manufacturer had created a system that required use of its cartridges with its printer. The refurbisher had found a way to circumvent the system.⁴⁰³ The refurbisher's actions were held to be a clear violation of the DMCA because its computer chip allowed the circumvention of

³⁹⁸ *Id.* at 445.

³⁹⁹ *Id.* at 439.

⁴⁰⁰ *Id.* at 450.

⁴⁰¹ See Edward Lee, *Rules and Standards for Cyberspace*, 77 NOTRE DAME L. REV. 1275, 1292-304 (2002) (contrasting case-by-case analyses of First Amendment violations to the use of general categories).

⁴⁰² *Corley*, 273 F.3d at 452.

⁴⁰³ *Lexmark Int'l, Inc.*, 253 F. Supp. 2d at 947-56.

Lexmark's copyright protected computer software.⁴⁰⁴ In response to the argument that the injunction would be anti-competitive, the court responded that the refurbisher's method of competition was not legitimate.⁴⁰⁵

Lexmark is an example of copyright as a purely private right. The argument cannot be made that the use of copyright here exemplifies the devolution of a government function. The case does illustrate how information can readily be turned into a product that defines and protects private property interests. To the extent that the DMCA should be read as privatizing a government function in the production and regulation of information, the *Lexmark* decision misinterprets the meaning and purpose of the DMCA.

The most troubling example of the DMCA as privatization is provided by a recent decision in *Verizon Internet Services*. The case illustrates the application of a provision that allows a copyright owner to "request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer."⁴⁰⁶ While the section does impose some formal requirements on the copyright owner, there is no requirement of pending litigation.⁴⁰⁷ The copyright owner does have to sign a sworn affidavit attesting to a good faith belief that copyright infringement has occurred.⁴⁰⁸ The RIAA obtained such a subpoena against Verizon in order to obtain the names of subscribers to Verizon's Internet service who were believed to be engaged in illegal copying and sharing of music files. Verizon refused to comply, and brought a declaratory judgment action seeking to invalidate section 512(h) as a violation of Article III and the First Amendment. The court rejected Verizon's claims, holding that since the DMCA does not regulate speech or expression and since it contains procedural protections against abuse, fraud, and mistakes, there was no First Amendment violation.⁴⁰⁹ Furthermore, since the district court clerk was serving a purely ministerial function, Article III courts were not implicated and therefore Article III did not apply.⁴¹⁰ "Under § 512(h)," the court concluded, "the clerk carries

⁴⁰⁴ *Id.* at 969-71.

⁴⁰⁵ *Id.* at 973.

⁴⁰⁶ 17 U.S.C. § 512(h) (2000).

⁴⁰⁷ *See id.* § 512(h)(4).

⁴⁰⁸ *Id.* §§ 512(c)(3)(A)(v), 512(h)(4).

⁴⁰⁹ *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 257-68 (D.D.C. 2003). The court had initially granted the RIAA's motion to enforce its subpoena in *In re Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24 (D.D.C. 2003).

⁴¹⁰ 257 F. Supp. 2d at 248-57.

out a non-discretionary duty that allows one private party to retrieve information from another private party.”⁴¹¹

The need for section 512(h) arises from the immunity granted to Internet Service Providers for copyright infringement under section 512(a). Copyright owners have to enforce their rights against direct infringers of copyright – the subscribers to the Internet service. Since the identities of the subscribers are known to the providers, entities like Verizon become the least-cost providers of information to copyright owners. Whatever efficiency justifications may exist for section 512(h), the provision illustrates further how the DMCA acts as a privatization of government functions. The DMCA permits private copyright holders to protect their rights technologically through private rights of actions that are supported by a private subpoena power to obtain information about potential plaintiffs. Both legislative powers and judicial powers are devolved to private parties. In light of copyright’s history as a means of privatization, the current state of the world under the DMCA should not be surprising. What is disturbing, however, is how far we have come from the coincidence of private claims and the public good that Madison professed for copyright. The D.C. Circuit has partly remedied the situation by reversing the district court in *Verizon*. The D.C. Circuit reasoned that the DMCA subpoena power could be used only against an Internet Service Provider that stored information about its users, not a provider that served as a mere conduit for information. By this judicious statutory reading, the appeals court has limited some of the private power granted to copyright owners.⁴¹²

IV. IMPLICATIONS OF THEORY, HISTORY, AND PRACTICE FOR POLICY

This Part focuses on how the privatization thesis elucidates four questions in copyright: copyrightable subject matter, fair use, the First Amendment, and copyright misuse and antitrust.

A. Is Everything Copyrightable?

The answer to this odd question may very well be yes. Section 102 defines what can and what cannot be copyrighted, and is divided into two subsections. The first subsection states that copyrightable subject matter includes all original works of authorship

⁴¹¹ *Id.* at 255.

⁴¹² See *Recording Indus. Ass’n of Am. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 69 U.S.P.Q.2d 1075 (D.C. Cir. 2003).

that are fixed in a tangible medium of expression.⁴¹³ Works of authorship are broken down into eight categories that include literary works, musical works, pictorial, graphic, and sculptural works, and architectural works.⁴¹⁴ The second subsection excludes ideas, procedures, methods, and discoveries from the ambit of copyright.⁴¹⁵ The two subsections imply several limitations on copyrightable subject matter. The expression must be fixed, it must be original, and it must not fall into one of the enumerated exclusions. These limitations have increasingly been construed narrowly. The fixation requirement excludes only live or other unrecorded performances from copyright.⁴¹⁶ The originality and idea/process limitations have also been narrowed for reasons I discuss below. The result seems to be that the scope of copyright is quite broad and includes not only traditional materials like books and songs, but also materials like legal standards, tax maps, legal complaints, legal briefs, and price data.⁴¹⁷

The broad reach of copyrightable subject matter reflects many developments in copyright law. The first is the shift from culture as artifact to culture as information.⁴¹⁸ Copyright's reach into legal materials and data suggests that cultural artifacts such as books and paintings are not the sole beneficiary of copyright protection. The transformation of informative materials into copyrightable subject matter reflects the reduction of books and other cultural materials into information.⁴¹⁹ Once all cultural artifacts are information, it becomes difficult to draw distinctions between books and data. The second development is the recognition of copyright as a private right to secure private interests.⁴²⁰ Just as copyright protection granted to books allows the author to secure valuable rents, so too, the argument goes, protection should be granted to all expression. The expansion of subject matter reflects both cultural

⁴¹³ 17 U.S.C. § 102(a).

⁴¹⁴ *Id.* §§ 102(a)(1)-(8).

⁴¹⁵ *Id.* § 102(b).

⁴¹⁶ See, e.g., Gregory S. Donat, Note, *Fixing Fixation: A Copyright with Teeth for Improvisational Performers*, 97 COLUM. L. REV. 1363, 1364-65 (1997) (discussing the requirements for improvisational performances to achieve copyright protection).

⁴¹⁷ See, e.g., Daniel J. Gervais, *Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law*, 49 J. COPYRIGHT SOC'Y U.S.A. 949, 954-58 (2002) (reviewing the lower courts' application of *Feist* to database compilations).

⁴¹⁸ See, e.g., DAVID R. KOEPSSELL, *THE ONTOLOGY OF CYBERSPACE: PHILOSOPHY, LAW, AND THE FUTURE OF INTELLECTUAL PROPERTY* 86-87 (2000) (discussing the transmission and tangibility of electronic information); Jeffrey Masten et al., *Introduction to LANGUAGE MACHINES: TECHNOLOGIES OF LITERARY AND CULTURAL PRODUCTION* 1, 5-6 (Jeffrey Masten et al. eds., 1997) (discussing the use of multimedia to teach literature).

⁴¹⁹ See BROWN AND DUGUID, *supra* note 392, at 19-21.

⁴²⁰ See DAVID SAUNDERS, *AUTHORSHIP AND COPYRIGHT* 163-64 (1992) (discussing the Industrial Revolution's impact on book copyrights).

changes and changes in the conception of copyright as a private right.

The privatization thesis demands a shift in how copyrightable subject matter is understood. As emphasized before, the thesis undermines the reduction of copyright to a private right. Furthermore, the thesis suggests that copyright serves a public purpose and facilitates governmental functions. Several implications for interpreting section 102 follow, and I will focus specifically on the implications for originality and for the exclusion of ideas.

Originality means that the work in question originates from the claimed owner of the copyright and that the work is imbued with the creative energy of its creator. The Supreme Court has made it clear that mere "sweat of the brow" does not support copyright.⁴²¹ Several scholars have emphasized how this standard privileges the individualistic genius author and removes products of pure physical labor from the protections of copyright law.⁴²² Scholars differ on whether this privileging and this distinction are desirable, but there seems to be something close to a consensus that the Supreme Court standard for originality is unworkable.⁴²³ The standard in application by lower courts has been watered down to the point that copyright seems to be protecting the sweat of one's brow rather than the pure product of the creative mind.⁴²⁴

The debate over the originality standard has typically been framed in terms of the meaning of authorship and Lockean theories of labor.⁴²⁵ The privatization thesis offers a different tack. Once copyright is understood as a means of privatizing a government function, the question becomes one of whether copyright fulfills a public function by the financing of certain creative ventures, the creation of cultural infrastructure, or the protection of minority voice. The implication is that copyright should attach to that subject matter which requires large investments in fixed cost and constitutes cultural architecture. Such a standard would exclude low-level works that do not impose high fixed costs for production (for

⁴²¹ Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 353-55 (1991).

⁴²² See, e.g., Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455, 496-500 (1991) (discussing the moral rights an author retains in a work after giving up economic rights).

⁴²³ See, e.g., Dennis S. Karjala, *Copyright and Misappropriation*, 17 U. DAYTON L. REV. 885 (1992) (discussing the potential that databases will receive insufficient copyright protection); Leo J. Raskind, *Assessing the Impact of Feist*, 17 U. DAYTON L. REV. 331 (1992) (arguing that lower courts will narrow the scope of copyright protection for data compilations).

⁴²⁴ See, e.g., *County of Suffolk v. First Am. Real Estate Solutions*, 261 F.3d 179 (holding that a county could hold a copyright over its tax maps).

⁴²⁵ See Gordon, *supra* note 149 (applying natural rights theory of intellectual property to free speech); Hughes, *supra* note 222 (arguing that fair use should be applied to derivative works).

example, the *Kelley Blue Book*, or legal briefs and complaints).⁴²⁶ Such a standard may also exclude databases that are largely used for private purposes, or data bases like the phone book, whose costs of production are defrayed through taxation or other means.⁴²⁷ The privatization thesis would shift the originality inquiry from one about standards of creativity to one about the costs of production and the public uses and needs of the creative work.

The *Veeck v. Southern Building Code Congress International, Inc.* decision is an example of the privatization thesis in action. In *Veeck*, the Fifth Circuit ruled that model codes once enacted lose copyright status because enactment constitutes citizen authorship of the statutes.⁴²⁸ The result is correct even though the analysis is wedded to the language of authorship and private property. By recognizing citizen authorship, the court acknowledged that the private drafting of the model code was a devolution of a government function. Citizen authorship permits the citizenry, as sovereign, to reclaim rights in the law. As a practical matter, I have pointed out in this Article and elsewhere that the court creates a potentially unworkable distinction between the text of the code and notes and comments. Under the process that I advocate here, a more meaningful approach would have been to consider the nature of the government function and the implications of recognizing a property right in the code. This analysis would require consideration not only of the function being privatized (here the creation of cultural infrastructure in law), but also alternative means to satisfy that function without copyright. Even though the court reached the correct result of making the code accessible to the public, what is troubling is that the court did not reach the more salient question of whether codes should be provided through copyright rather than through more familiar legislative processes.

I have described the originality analysis in terms that greatly expand the scope of judicial scrutiny. But in practical terms, my recommendation mandates a shift of emphasis in the originality inquiry, from one of authorship to one of recognizing the need to protect certain texts. Section 102, as drafted, is about the text and not about the author. The focus of authorship in interpreting section 102 reflects the prevalence of a Lockean theory of copyright that rests on the protection of labor. But what is more relevant is

⁴²⁶ For a case involving the copyrightability of *Blue Book* values, see CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc., 44 F.3d 61 (2d Cir. 1994).

⁴²⁷ See, e.g., Jane C. Ginsburg, *Copyright, Common Law, and Sui Generis Protection of Databases in the United States and Abroad*, 66 U. CIN. L. REV. 151, 153 (1997) (arguing that American and European copyright reforms inadequately address fair use).

⁴²⁸ 293 F.3d 791, 799 (5th Cir. 2002).

the nature of the product being protected by copyright. Ignoring the text ignores the social, economic, political, and cultural differences among books, music, software, legal code, religious texts, digitized information, data, databases, and legal materials. Understanding these texts solely in terms of a general theory of the author ignores the contexts in which texts are created and used. The privatization thesis shifts the focus from author to text. The question is not whether an author needs an incentive to produce the text, but whether the text, given how it is created and used, needs to be protected. For example, the legal codes, according to this theory, are not copyrightable because they are created for the purpose of public deliberation and application. Religious texts are copyrightable, under this theory, because of the needs of a church to define the meanings and uses for a particular congregation. Similarly, movies and books are copyrightable because of the market system that has certain desirable features for the creation and dissemination of these texts. The privatization understanding of copyright forces a consideration of context and use in the analysis of copyrightability.

Of course, copyrightable subject matter is just one doctrinal point. When I say that religious texts or movies or books are copyrightable, I do not mean that a purely private right to exclude exists. Under the privatization thesis, copyrightability does not mean broad excludability. The thesis has important implications for other doctrines in copyright, and can reinvigorate public protecting doctrines such as fair use and the First Amendment. I turn to each of these next.

B. The Problem of Fair Use as a Private Right

Fair use, as the name suggests, may serve as a means of restoring public values to copyright. But too much should not be made of the name. In practice, fair use, originally called privileged use, has been interpreted as vindicating private rights of authors in an infringement suit.⁴²⁹ As Judge Pierre Leval, a Second Circuit judge influential in the area of copyright, explains, fair use is privileged use that allows an author who has transformed a copyrighted work in the course of infringing it to be absolved of liability.⁴³⁰ The doctrine recognizes that transformations of copy-

⁴²⁹ See *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (recognizing fair use as privileged use); Gordon, *supra* note 35; cf. Lunney, *supra* note 58 (analyzing the market effects of *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)).

⁴³⁰ Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110-11 (1990).

righted work, such as parodies and criticism, should not be enjoined, nor should they subject their creators to liability in an infringement action. This definition rests on the assumption that fair use is a private right of the infringer. Recent judicial decisions have construed fair use in a narrow way to protect the rights of the copyright owner.⁴³¹ In *A&M Records, Inc. v. Napster, Inc.*, for instance, the Ninth Circuit held that a use is not justified, even if it is transformative, if the use interferes with the copyright owner's rights of entry into a market.⁴³² Against this background of construing fair use largely in terms of private rights, the privatization thesis serves to resurrect public values in the fair use doctrine.

A point of contention among copyright scholars is the status of the fair use doctrine as a rule of equity. A recently published hornbook on intellectual property states that fair use tends to be seen as an equitable rule.⁴³³ Justice Story, in *Folsom v. Marsh*,⁴³⁴ a case involving copyright in George Washington's letters, introduced fair use into copyright jurisprudence as a justification for infringement.⁴³⁵ However, Judge Leval's account of its history shows that fair use sounded in a court of law, not equity.⁴³⁶ Congress's codification of fair use in the Copyright Act of 1976 settled the doctrine's status as a legal one. The codification reduced the fair use analysis into a multi-factor balancing test that permits the assessment of a particular use as fair in terms of four factors: the purpose and character of the use, the nature of the copyrighted work used, the amount taken from the copyrighted work, and the effect of the use on the potential market for the copyrighted work.⁴³⁷

Even though fair use is a rule of law rather than an equitable rule, equitable principles often inform the manner in which the doctrine is applied. Prior to the codification of fair use in 1976, courts would often refer to fair use as an equitable rule of reason, contrary to the history of the doctrine.⁴³⁸ What this meant is that there is discretion in how the law is to be applied, and this discre-

⁴³¹ See, e.g., *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1115 (9th Cir. 2000); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000).

⁴³² 239 F.3d 1004, 1017 (9th Cir. 2001).

⁴³³ See ROGER E. SCHECHTER & JOHN R. THOMAS, *INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS, AND TRADEMARKS* 216-17 (2003).

⁴³⁴ 9 F. Cas. 342 (C.C.D. Mass. 1841).

⁴³⁵ *Id.* at 350.

⁴³⁶ See Leval, *supra* note 430, at 1127-28.

⁴³⁷ 17 U.S.C. § 107 (2000).

⁴³⁸ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984) (referring to fair use as equitable rule of reason with reference to previous cases).

tion could be formed by public values. In the famous case of *Time-Life v. Geis*, involving unauthorized reproductions of stills from the Zapruder film, the court held, expressly on equitable grounds, that the public interest in having access to information about the President Kennedy's assassination outweighed the interests of the copyright owner.⁴³⁹ Even after the codification of fair use in 1976, courts still on occasion refer to copyright as an equitable rule of reason, and scholars attempting to revive fair use as a means of limiting private rights discuss fair use as a rule of equity.⁴⁴⁰

The tension between law and equity in fair use is one of determining how to interpret the 1976 codification of the doctrine in public minded terms. Several cases illustrate this point. The Supreme Court held that unauthorized publication by *The Nation* of excerpts from President Ford's unpublished autobiography was not a fair use.⁴⁴¹ The Court applied the fair use factors from the 1976 Copyright Act in a fairly mechanical manner. Characterizing the publication by *The Nation* as "news scooping," the Court held that *The Nation* lost on all four factors. Particularly salient was the fact that *The Nation's* scooping caused Ford's publisher to lose a valuable contract with *Time Magazine* to publish the excerpts first.⁴⁴² Notice that the Court framed the fair use largely in terms of the conflict between *The Nation's* right to scoop and Ford's right to publish first.

Judicial considerations of fair use and parody also frame the analysis in terms of conflicting private rights. The rap version of the Roy Orbison song, *Oh, Pretty Woman*, created by Luther Campbell, was the subject of a suit brought by the song's copyright holder.⁴⁴³ Campbell's version of the song transformed Orbison's work while maintaining some of the musical and literary elements. The Supreme Court, while not directly ruling on the issue of fair use, emphasized Campbell's transformative efforts as key elements in determining whether his use of Orbison's work constituted fair use.⁴⁴⁴ Once again, the Court worked through each of the fair use factors and suggested that Campbell's use was excused because the rap version was highly creative and did not interfere with Orbison's market for his song.⁴⁴⁵

⁴³⁹ *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968).

⁴⁴⁰ See SCHECHTER & THOMAS, *supra* note 433, at 216 nn.8-10.

⁴⁴¹ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 569 (1985).

⁴⁴² *Id.* at 542.

⁴⁴³ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 569 (1994).

⁴⁴⁴ *Id.* at 579.

⁴⁴⁵ *Id.* at 578-94.

The Ninth Circuit's analysis in *The Cat in the Hat* case was less favorable to the parodist.⁴⁴⁶ The court held that the use of materials from Dr. Seuss was not a parody, but a satire that was created by misappropriating elements from an author without sufficiently transforming them.⁴⁴⁷ Whatever difference in result for would-be parodists, the two cases share a conception of fair use as a conflict between two private authors trying to establish rights in their respective works.

A final example of the private property values permeating fair use analysis is provided by the *Napster* case.⁴⁴⁸ The dispute pitted copyright owners in music who were defending established methods of producing and distributing music against the creator of a new method of distribution. The Ninth Circuit applied the fair use factors and found against Napster, concluding that users of Napster did not transform the work in any creative way, and that the new method of distribution interfered with the market rights of the copyright owner not only to sell their songs through conventional channels, but also through digital ones.⁴⁴⁹ As the court stated, Napster infringed on the music copyright owner's rights of first entry into the digital download market for their songs. *Napster* did not pit author against news-scooper or author against creative transformer, but it did entail a conflict between private parties in the control over a new market created by the Internet.⁴⁵⁰ Once again, the fair use analysis is framed in terms of a conflict between private rights holders.

To reduce a fair use analysis to a matter of conflicting private rights ignores the public values that fair use should vindicate. Justice Story's characterization of fair use as a justification for interfering with a private right suggests that more is at stake than a vindication of purely private claims.⁴⁵¹ The work at issue in *Folsom* was the multi-volume compilation of President Washington's letters that were edited and published under Washington's authorization. The alleged infringer had published an abridged version of the compilation for wider distribution and readership. Justice Story's concern was with the proper treatment of Washington's letters, not with which of two editors should have the right to the text. In analyzing the equities in allowing the edited version of the

⁴⁴⁶ *Dr. Seuss Enters. v. Penguin Books U.S.A., Inc.*, 109 F.3d 1394, 1405 (9th Cir. 1997).

⁴⁴⁷ *Id.* at 1400-01.

⁴⁴⁸ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015-16 (9th Cir. 2001).

⁴⁴⁹ *Id.* at 1015-24.

⁴⁵⁰ *Id.* at 1026-27; see Ghosh, *supra* note 69, at 578-80 (arguing that business method patent protection would give creators of file sharing systems a proprietary interest in the system).

⁴⁵¹ *Folsom v. Marsh*, 9 F. Cas. 342, 345-46 (C.C.D. Mass. 1841).

letters, Justice Story emphasized the effects on the complete, unedited text.⁴⁵² These effects were not isolated to harm to the author in the marketplace, but extended to harm to the text itself as a definitive collection of Washington's letters and an important cultural artifact. Justice Story's approach is echoed in that of the *Geis* court that found public value in dissemination of stills from the Zapruder film. Once again the focal point of the analysis was the cultural and public value of the text, rather than the economic and property rights of the author.⁴⁵³

The two examples provided by *Folsom* and *Geis* illustrate possibilities for a public minded fair use doctrine. The privatization thesis supports and necessitates such an approach. The support comes from the conceptualization of copyright, under the thesis, as the devolution of a government function. The devolution implies that fair use should not be seen in terms of a private conflict between two authors. The necessity of fair use arises from the dangers of privatization. By devolving a function to a private party, the government runs the risk of losing control over how the function is carried out. Fair use is one way the state can monitor the private execution of the government function. Fair use limits private rights by ensuring that the public purpose of copyright is not being hindered.

The problem with pursuing a public minded fair use doctrine is that one must deal with Congress's codification of the doctrine. While my analysis would support a redrafting of the provision, it is unlikely that my proposal would be enacted legislatively for the simple reason that this issue is not on the current agenda. However, the issue of fair use under the DMCA is an open question, and my suggestions here may have some legislative play in that context. Nonetheless, the fair use factors can be described as canonical, and any legislative action on fair use under the DMCA may very likely borrow from these factors. The next critical question is how to incorporate public minded copyright into current statutory fair use analysis.

Current analysis begins with a characterization of the use followed by a consideration of the fairness of allowing the use, assessed in light of the aforementioned factors. The problem is that this use is often characterized in terms of private, creative or transformative activity, such as news scooping or parody. The fairness is assessed in terms of how this private activity conflicts with the rights of the copyright owner in the marketplace. However, the use need not only be understood in private terms. For example, in

⁴⁵² *Id.* at 348.

⁴⁵³ *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144-46 (S.D.N.Y. 1968).

Worldwide Church of God,⁴⁵⁴ the relevant use of the text was for religious service and dissent. Seen only in private terms, the dissident's use would be described as pure copying and not transformative. In *Veeck*, the Fifth Circuit precisely described the defendant's use as slavish copying and non-transformative, ignoring the use of the text to inform citizens about the law.⁴⁵⁵ The first step in reforming fair use is to recognize broader categories of use, which requires appreciating the broader context in which the copyrighted text will be used. If this seems like a radical step, consider that the Supreme Court implicitly had a broader notion of use in the *Sony* case, which found the wholesale reproduction of broadcast programs, activity that was clearly not transformative, to be fair use.⁴⁵⁶ The Court recognized the use in question, time shifting, in a broader social context of television viewing.

Broadening the concept of use is just the first step. The four factors should also be applied in a way that recognizes the broader public benefits of the use pitted against the private rights of the copyright owner. This analysis is not a pure utilitarian balancing of costs and benefits. Applying the four factors, under my proposal, requires an understanding of the institutions and contexts in which the use is made and the specific threat posed to the copyright holder. Such an understanding should inform each of the four factors.

The purpose and character of the use should not be analyzed solely in terms of transformative value added by the defendant. Rather the use should be understood in as broad a social context as possible. Furthermore, the nature of the copyrighted work should not be determined in terms of categories like fiction or fact, and informative or entertaining, the approach adopted by current courts. Instead, the nature of the copyrighted work should be analyzed in terms of why the work was created and how it has come to be used. Consideration of the amount taken by the defendant may appear to be a non-discretionary factor, but, as many courts have shown, can also be informed by context. For example, in the copyright dispute between *Hustler* and Jerry Falwell, the Ninth Circuit held that Falwell's message required the wholesale copying of Flynt's work.⁴⁵⁷ In other cases, such as in *The Nation* case,

⁴⁵⁴ *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1120 (9th Cir. 2000).

⁴⁵⁵ *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791, 823-25 (5th Cir. 2002).

⁴⁵⁶ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 424-44 (1984). *But cf. id.* 465-66 (Blackmun, J., dissenting) (arguing in dissent that the making of a single copy for private consumption, with no educational or other purpose, cannot be a basis for fair use).

⁴⁵⁷ *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1153 (9th Cir. 1986).

courts recognize that the expression of the defendant's message did not require wholesale copying.⁴⁵⁸ A truly dynamic, contextual consideration of the fair use factors will permit a public minded fair use doctrine.

Broader consideration of the fourth factor, market effects, will also facilitate public values as a check on private rights. The public minded copyright law that I am advocating does not lead to the rejection of markets as a means of distributing copyrighted materials. The privatization thesis supports a pragmatic appreciation of markets as social and public institutions that permit dissemination of copyrighted materials to the public on the basis of willingness to pay. This pragmatic appreciation recognizes the limits of markets, and situates markets with respect to other institutions, such as libraries and universities, that disseminate cultural artifacts. The key is not to assume markets as the sole, or necessarily most desirable, means of dissemination. It is one option among many. For example, in *Veeck*, the model code drafters made the argument that *Veeck's* use could not be fair because it impeded their ability to market the code and generate revenues to fund the code drafting.⁴⁵⁹ The relevant question is whether the sale of the code is the appropriate way to fund the drafting of code that is enacted by a state, and how this method compares with general taxation as the means of funding law making. In *Napster*, instead of appealing to a right of first entry into any market for the copyrighted work, the court should have considered the effects of restricting entry on the relevant market for digital downloads.⁴⁶⁰ In a separate paper, I analyze the effects of limiting entry through copyright (and conclude that *Napster* may have been correctly decided while other cases clearly were not).⁴⁶¹ The privatization thesis supports a more contextual analysis of markets that requires a comparison of market-based distribution of cultural artifacts with other institutional arrangements. Markets are not seen as purely private arrangements, but as social ones that are informed with public values and assessed by comparison to other possible arrangements.

A public minded fair use is possible even within a contemporary fair use doctrine that some argue to be purely legal, and not equitable. Such a transformation is necessary in light of fair use's framing of a conflict as between two sets of private interests, those

⁴⁵⁸ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561-62 (1985).

⁴⁵⁹ *Veeck*, 293 F.3d at 824.

⁴⁶⁰ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1016 (9th Cir. 2001).

⁴⁶¹ See Randall C. Picker, *Copyright as Entry Policy: The Case for Digital Distribution*, 47 ANTITRUST BULL. 423 (2002) (arguing that copyright and antitrust law may not be adequate to protect free entry into the online distribution industry).

of the owner and those of the user. By recasting copyright as originating in a government function, the public mindedness of fair use becomes secured and can be structured appropriately.

C. *The First Amendment and Copyright*

Whether copyright law abridges freedom of speech continues to be a question of great scholarly and practical controversy.⁴⁶² Much of the current debate centers on the question of whether to characterize copyright within First Amendment jurisprudence.⁴⁶³ The privatization thesis sheds light on the proper relationship between copyright and the First Amendment by expanding the inquiry beyond a question of how to characterize copyright as speech regulation. The thesis supports the broader approach suggested by Justice Breyer in his dissent in *Eldred v. Ashcroft*.⁴⁶⁴

1. *Current Doctrine on the First Amendment and Copyright*

The Supreme Court, in *Eldred v. Ashcroft*, affirmed the long established view that the First Amendment does not provide an independent limit on copyright.⁴⁶⁵ The view is based on the historical background to the enactment of copyright law and the rati-

⁴⁶² "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I.

⁴⁶³ The seminal articles on the relationship between the First Amendment and Copyright are Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970) (identifying instances when copyright can stifle speech and suggesting that fair use might mediate between copyright and the First Amendment), and Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970) (answering "no" to the question in his title, and arguing that there is no independent First Amendment limitation on copyright). For the recent debate, see C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891 (2002) (examining the implications of the speech clause and the press clause for determining the permissible and appropriate extent of copyright law); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283 (1979) (attempting to determine which First Amendment challenges to copyright deserve consideration and which should be cast aside); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998) (arguing that while copyright law restricts speech, permanent injunctions in copyright should be constitutional; preliminary injunctions should only be constitutional in cases of clear copying); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001) (enumerating changes in copyright law since 1970, and arguing that copyright law should be subject to rigorous intermediate scrutiny); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1 (1987) (arguing that copyright's constitutional purpose is best served by encouraging a distribution of the works); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1 (2002) (arguing that copyright's prohibition of unauthorized derivative works is unconstitutional, but could be saved if damages and injunctions were replaced by an action for profit allocation). Two prominent copyright scholars recently described copyright law as a form of "free speech policy" and argued that the Statute of Anne vindicated free speech values that are embodied in the First Amendment. See Patterson & Joyce, *supra* note 168, at 945.

⁴⁶⁴ See *Eldred v. Ashcroft*, 537 U.S. 186, 243-66 (2003) (Breyer, J., dissenting).

⁴⁶⁵ *Id.* at 218-19.

fication of the Bill of Rights. According to the Court, Congress is presumed to have understood the potential First Amendment problems with copyright and resolved them within the statutory scheme. Courts repeatedly refer to the First Amendment safeguards built into copyright, such as fair use and the idea/expression distinction.⁴⁶⁶ Despite these safeguards, the problem of the First Amendment and copyright is recurring, as copyright owners seek to enjoin infringers in a way that resembles state censorship of books and movies. In fact, the Eleventh Circuit, in 2001, deviated from the traditional constitutional jurisprudence by holding that an injunction against the publication of *The Wind Done Gone*, an allegedly infringing book that riffed on *Gone With the Wind*, was a prior restraint of speech and removed the injunction.⁴⁶⁷ Cracks continue to appear in the structure of constitutional jurisprudence holding that the First Amendment offers no check on copyright other than what has been established statutorily.

However, the lack of a persuasive theory of the First Amendment hampers the development of a more robust free speech jurisprudence in copyright. The Blackstonian perspective, that free speech rights primarily forbid prior restraints, informs analyses of injunctive remedies in copyright, such as the one at issue in *The Wind Done Gone* case.⁴⁶⁸ Beyond the injunction context, no coherent theory of the First Amendment exists in the area of copyright. The problem is that copyright is a form of speech regulation, and understanding the proper role of the First Amendment as a limit on copyright runs up against assumptions about the proper balance between property and regulation.⁴⁶⁹ As I show below, the privatization thesis revives arguments for some types of First Amendment limits on copyright, and provides a critique of the contemporary approach.

Current First Amendment doctrine is built on a categorical approach that distinguishes among different types of speech and different types of regulations.⁴⁷⁰ Categories of protected speech include political speech, which obtains a high level of protection, commercial speech, which obtains an intermediate level of protec-

⁴⁶⁶ *Id.* at 192-220.

⁴⁶⁷ *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

⁴⁶⁸ See Hannibal Travis, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 BERKELEY TECH. L.J. 777, 789-804 (2000).

⁴⁶⁹ See, e.g., Tom W. Bell, *Free Speech, Strict Scrutiny, and Self-Help: How Technology Upgrades Constitutional Jurisprudence*, 87 MINN. L. REV. 743 (2003).

⁴⁷⁰ See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981); Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671 (1983).

tion, and obscene speech, which obtains no protection. Since copyrightable expression spans all of these categories, from political pamphlets to mass market magazines and advertisements, the speech categories are not all that helpful for understanding the First Amendment limits on copyright.⁴⁷¹ The focus, therefore, has been on the categories of regulation. The distinction is made between content-based regulations, which receive a high level of scrutiny under the First Amendment, and content-neutral regulations, which receive an intermediate level of scrutiny. Scholarly debate revolves largely around which of these two categories appropriately describes copyright.⁴⁷²

The distinction between content-neutral and content-based regulations, a distinction that profoundly determines the scope of First Amendment protection, has largely been an incoherent one. As the Supreme Court has stated, the distinction rests on the question of “whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”⁴⁷³ The definition focuses on the message, rather than on the media through which the message is conveyed. For example, in an important case involving the regulation of cable, the Court found the regulation to be content-neutral largely because the regulation governed the media rather than the message.⁴⁷⁴

However, the test’s focus on the government’s reason for the regulation suggests that the distinction rests on something more than the difference between the media and the message. For example, in *Hill v. Colorado*, the Court was confronted with the question of whether a regulation prohibiting “speech-related conduct within 100 feet of the entrance to any health care facility” was content-based or content-neutral.⁴⁷⁵ The regulation fairly clearly was meant to protect access to abortion clinics and other health care facilities, which were targeted as sites for protest. The majority held that it was content-neutral because the statute did not prohibit the speech based on the content of the speech since abortion defenders and abortion supporters were equally restricted under the language of the regulation.⁴⁷⁶ The dissenters, on the other hand, contended that the regulation was content-based since the

⁴⁷¹ See Netanel, *supra* note 463, at 19.

⁴⁷² *Id.* at 47-49; see also Baker, *supra* note 463, at 908-09; Lemley & Volokh, *supra* note 463, at 186; Rubinfeld, *supra* note 463, at 6 n.18.

⁴⁷³ Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

⁴⁷⁴ Turner Broad. Sys. v. FCC, 512 U.S. 622, 645 (1994).

⁴⁷⁵ 530 U.S. 703 (2000).

⁴⁷⁶ *Id.* at 723.

government's motive in enacting the restriction was to protect seekers of abortions from abortion protestors.⁴⁷⁷

The privatization thesis suggests that the distinction between content-based and content-neutral is frustratingly irresolvable and wrongheaded when applied to copyright. The problem posed by copyright is determining when content distinctions are being made. Certainly, the individual copyright owner makes content-based distinctions in determining when to sue for infringement and when to license her copyrighted expression. For example, the decision not to license the creation of a sequel or a movie is a decision based on the content of the proposed sequel or movie. But this content distinction is a private decision. Under this characterization, copyright law is seemingly content-neutral when seen from the perspective of the government actor. On the other hand, not all expression is treated equally under copyright law. Some expression gets no protection and others get quite a bit. These are content-based distinctions that imply different First Amendment treatment. As I explain in the next subsection, the distinction between content-neutral and content-based regulations suffers from an insufficient definition of the word *content*.

2. Problems with the Content-Based, Content-Neutral Distinction

What constitutes "content"? In the *Hill* case, the majority implied that the regulation was not based on content because the language of the statute referred to broad categories, such as oral protest, education, and counseling.⁴⁷⁸ The dissenters, however, emphasized that the purpose of the statute was to regulate anti-abortion speech, and therefore, despite the broad categories enumerated in the statute, it pertained to specific speech in practice, namely speech that was meant to interfere with the exercise of the right to an abortion. For the majority, content is determined categorically; for the dissenters, through use of context. The Supreme Court itself is divided on what constitutes content.

The meaning of the word *content* is even more inscrutable in the context of copyright. Copyright, so the mantra goes, protects expression, not ideas. If content means only ideas, then the categorical approach does not apply at all. This tack seems to be the one adopted by a Supreme Court that sees no independent First Amendment limit on copyright.⁴⁷⁹ If content means expression and ideas, then the First Amendment would be applicable to copyright,

⁴⁷⁷ *Id.* at 744-46.

⁴⁷⁸ *Id.* at 719.

⁴⁷⁹ See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 219-20 (2003).

but we are left with the quandary of whether copyright was enacted "because of disagreement with the message it conveys."⁴⁸⁰

The centrality of government motive in the categorization of regulation for First Amendment purposes turns the inquiry into one of attitudes towards the substantive law.⁴⁸¹ As applied to copyright, the test could turn either way. The argument for content neutrality rests on copyright law's lack of reference to the content of the speech. The mantra in copyright is that it protects the expression of ideas, not the ideas themselves. In other words, copyright protects the media in which the idea is protected. Under this conceptualization, content-neutral treatment is appropriate (as Professor Netanel has concluded).⁴⁸² Additional support for content neutrality comes from recognizing that Congress's purpose in enacting copyright was based not on the content of speech, but on the goal of "promot[ing] the Progress of Science and useful Arts,"⁴⁸³ by securing rights of the copyright holder in the publishing and marketing of her expression.⁴⁸⁴ Under this view, copyright law is about regulating the medium of speech through market and other channels by which speech is disseminated.

Of course, copyright can also be characterized as content-based. The enforcement of copyright requires consideration of the content of speech to gauge whether it is original and whether it is not unprotected material under section 102(b). The infringement inquiry also requires extensive content-based judgments both in determining the metes and bounds of protected expression, and in determining whether the alleged infringer's work falls within the metes and bounds of the owner's work. Furthermore, application of defenses like fair use mandates an examination of the content of both copyright owner's and infringer's speech to determine whether the infringer's speech is sufficiently transformative to avoid the imposition of liability.

Close readers of Supreme Court opinions will point out that my arguments here are not sufficient or necessary for categorizing copyright as a content-based regulation. In fact, my arguments would support content-based categorization for any regulation that requires an enforcer or adjudicator to consider the content of

⁴⁸⁰ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

⁴⁸¹ See Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249 (1995) (arguing that the First Amendment has become superficial and incoherent, and will continue that way until it is focused on the constitutional significance of particular social practices).

⁴⁸² See Netanel, *supra* note 463, at 48.

⁴⁸³ U.S. CONST. art. I, § 8, cl. 8.

⁴⁸⁴ See Netanel, *supra* note 463, at 49-50 (arguing that copyright is content-neutral because it provides an economic incentive).

speech. The correct inquiry is on the government's purpose in enacting the regulation.⁴⁸⁵ But a consideration of motive only strengthens the case for content-based treatment of copyright. Traditionally, copyright protection has extended to only certain categories of expression. The first copyright statute applied to books, maps, and charts.⁴⁸⁶ The choice to include certain types of expression, and exclude others, was a content-based judgment that one type of expression required or deserved the market exclusivity granted through copyright and other types did not. Even though contemporary copyright is more expansive in subject matter, this differentiation based on content is continued through the originality requirement and the fair use standards.⁴⁸⁷ Originality rests on a judgment of creativity, as the Supreme Court has held in *Feist*.⁴⁸⁸ The decision to protect creative expressions and not uncreative ones under copyright law suggests that the government's motives were based on the content of speech. Similarly, for fair use, the conclusion that transformative, critical, or scholarly use is protected, while non-transformative, non-critical, or non-scholarly use is not, reflects a motive based on content. Therefore, the case for content-based treatment of copyright has been made and seems equally as strong as the case for content-neutral treatment.

If the meaning of content is incoherent and if we cannot say whether copyright law is about the media or the message, then we need some other theory to aid in understanding the relationship between the First Amendment and copyright. The privatization thesis offers a possible approach.

3. *Recognizing Public Values in Copyright Through the First Amendment*

Although the question of the appropriate theory of the First Amendment is beyond the scope of this Article, the privatization thesis of copyright has important implications for independent First Amendment scrutiny of copyright. Copyright is speech regulation, and is also a devolution of a government function to private parties. Through copyright law, the government is regulating speech indirectly through the private enforcement of rights. Be-

⁴⁸⁵ *Ward*, 491 U.S. at 791. *But see* *United States v. Playboy Entm't Group*, 529 U.S. 803 (2000) (holding that a statute requiring providers of adult content to filter out sound is a content-based regulation).

⁴⁸⁶ Copyright Act of 1790, ch. 15, 1 Stat. 124 (entitled "An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned").

⁴⁸⁷ *See* Rubinfeld, *supra* note 463, at 16-21.

⁴⁸⁸ *Feist Publ'ns, Inc. v. Rural Tele. Serv. Co.*, 499 U.S. 340 (1991).

cause, under the terms of the privatization thesis, the enforcement of private rights facilitates the execution of a government function, the First Amendment should serve as a limit on the scope of these rights. Absent the First Amendment limits on copyright, the government would be able to abridge speech indirectly in ways that would be impermissible through direct regulation. The First Amendment limit on injunctive relief provides an example. Congress cannot impose a prior restraint on the publication of a book through direct regulation. Similarly, it should be prevented from imposing a prior restraint indirectly through injunctive relief for violation of copyright law. The principle applies beyond injunctive relief. For example, damage awards in copyright do not prohibit speech from occurring, but impose a burden on speaking. The burden imposed by copyright damages should be subject to First Amendment scrutiny, although differently from the prior restraint standard applied to injunctive relief.⁴⁸⁹

Not only does the privatization thesis highlight copyright law's status as speech regulation, but it also explains why the content-based/content-neutral distinction is unhelpful. The categorization can be played in either direction. Since private parties are enforcing copyright law, content decisions are arguably made by private parties, and therefore the state's devolution is content-neutral. On the other hand, the government is devolving its functions to private parties, and the execution of these functions requires content-based decisions, making the case for content-based categorizations.

The Supreme Court's decision in *San Francisco Arts & Athletics, Inc.* illustrates this dilemma.⁴⁹⁰ At issue in the case was a suit brought against the planners for a series of athletic competitions for gay athletes. The planners described the games as the "gay Olympics." The United States Olympic Committee ("USOC"), a private corporation to whom Congress delegated rights in the term "Olympics" for the purpose of organizing the official Olympics games in the United States, sued for trademark infringement. The planners of the "gay Olympics" raised a First Amendment defense. The Supreme Court held for the USOC, finding there was no violation of the First Amendment. The Court held that the USOC was a private organization not subject to Constitutional restrictions.⁴⁹¹ In response to the argument that Con-

⁴⁸⁹ See Rubinfeld, *supra* note 463, at 56-57; *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding that a public official's libel action for damages violates the First Amendment unless actual malice is shown).

⁴⁹⁰ 483 U.S. 522 (1987).

⁴⁹¹ *Id.* at 544.

gress's delegation to the USOC of exclusive rights in the word "Olympics" was a First Amendment violation, the Court held that this delegation constituted a reasonable restriction on speech because Congress was allowing USOC to capture the returns from managing and utilizing the word "Olympics" in the organizing of the games.⁴⁹² The lone dissent written by Justice Brennan illustrated an approach similar to the one proposed here. According to the dissent, by denying a gay group use of the term "Olympics," the Congressional delegation to a private corporation permitted impermissible content-based and viewpoint-based discrimination in violation of the First Amendment.⁴⁹³

The majority in the gay Olympics case viewed the regulation as content-neutral; the dissent as content-based. The majority and dissent differed on how the government decision was characterized. For the majority, Congress's delegation was the relevant government action, and that decision was made in content-neutral terms. For the dissent, the delegation to a private party of rights in a word and the execution of those rights in a discriminatory manner were the relevant government action. The privatization thesis would support a more straightforward analysis: If Congress directly could not prevent a private citizen from using the word "Olympics," then Congress cannot prevent this from happening indirectly by delegating its function to a private entity like the USOC.

The privatization thesis supports the need for First Amendment limits on copyright and provides a basis for an alternative to the categorical approach. Justice Breyer's dissent in *Eldred v. Ashcroft* addresses the constitutionality of copyright in a way that harmonizes many of the arguments I make here. Under this approach, a copyright statute "lacks the constitutionally necessary rational support if: (1) the significant benefits that it bestows are private, not public; (2) it threatens to seriously undermine the expressive values that the Copyright Clause embodies; and (3) it cannot find justification in any significant Clause-related objective."⁴⁹⁴ Although Justice Breyer's test is meant to answer the question of when Congress has properly exercised its power under the Intellectual Property Clause, the three-pronged test is designed to take account of First Amendment values under an analysis of Congressional power. The first part of the test recognizes the public values underlying copyright by asking whether the relevant

⁴⁹² *Id.* at 540-42.

⁴⁹³ *Id.* at 563-71 (Brennan, J., dissenting).

⁴⁹⁴ *Eldred v. Ashcroft*, 537 U.S. 186, 244-45 (2003) (Breyer, J., dissenting).

provision of the copyright law bestows a private rather than a public benefit. The second part emphasizes the expressive values in copyright of promoting speech. The last part looks to other copyright ends, such as the securing of authors' rights for a limited time and promoting progress in science. In contrast to the categorical approach, Justice Breyer's test takes into consideration the myriad objectives of copyright, with emphasis on the public values of free expression and dissemination.

In conclusion, the contemporary approach to the First Amendment and copyright does not adequately address the range of expressive and public values that should inform both areas of law. Instead, First Amendment rights and copyright are viewed as purely private rights, the first necessary to facilitate exchange in the marketplace of ideas, the second in the marketplace of expressions. Attempts to create First Amendment limits on copyright flounder on the difficulties of defining content and identifying copyright as media or message. The privatization thesis, by recognizing copyright as a devolution of a government function, permits a proper balance between First Amendment and copyright, one that recognizes the need for a First Amendment curb on copyright based on a full consideration of public values, as exemplified by Justice Breyer in his *Eldred* dissent.

CONCLUSION

This Article presents a quest for public minded values in copyright law. Starting from Madison's appeal to the public good and modern theories of public goods and democracy, the quest proceeds through a re-examination of copyright history in England and the United States and an analysis of three compelling areas of contemporary copyright doctrine, and finishes with ideas for re-thinking copyrightable subject matter, fair use, and the First Amendment. In the end, the quest leads to Justice Breyer's dissent in *Eldred v. Ashcroft*, which recognizes the intimate connection between public values and private property in copyright law.

To deprivatize copyright entails recognizing that copyright is not solely a private right that is enforced through the mechanisms of copyright law. The tendency to see copyright as a reflection of purely private interests ignores copyright's history in licensing, and assumes that the creation of authors' rights through the Statute of Anne entailed the establishment of copyright as property, akin to the creation of interests in real property. The privatization thesis acknowledges that copyright creates a private right, but a private right imbued with a public purpose. By placing copyright

within the framework of privatization, it is possible to revive public values in copyright policy and engage the current debates over copyright in the contexts of model codes, religious texts, and the DMCA.

Recognizing the public in copyright law responds to those who would see copyright solely as a private property right. There is superficial appeal in viewing copyright as private property, especially on the grounds that the government should remain outside the realm of cultural production. But analogizing copyright to private property, particularly real property, raises the important legal realist critique of real property as instrumental to social and political ends rather than as an essentialist, pre-political and pre-social right. The central lesson of this Article is that copyright is like real property in the realist sense of an instrument to obtain certain ends. Copyright, however, diverges from real property in terms of the ends it is designed to achieve. I have shown how copyright serves as a means of privatizing government functions of cultural production. But to conceive of copyright as privatizing government functions does not mean that the state need take over the realm of cultural productions. Instead, my purpose is to bolster the view of copyright as public minded and regulatory, as a means of attaining the public good, appealed to by Madison. This reconceptualization provides a basis for rethinking copyright doctrine and the links between copyright law and the First Amendment.

While the focus of this Article has been on copyright, my argument extends to patent as well, even though, as I have stated earlier, patent has been problematic in a different way from copyright. Future research will specifically explore the privatization thesis in the context of patent, and develop a democratic theory of patent law and science policy. My argument here, however, has immediate implications for how to think of intellectual property more broadly as the vindication of purely private interests. To think of rights in cultural artifacts or scientific and technical knowledge as fixed and stable property rights ignores the progress of culture and science. To reduce the output of cultural and scientific ventures into fixed rights is to potentially ossify the processes of creation and invention. The privatization thesis developed through exploration of theory, history, and doctrine in this Article liberates copyright (and indirectly patent) from the restrictions of property and truly promotes progress and the public good, as Madison envisioned and modern democratic societies desire. The thesis I espouse in this Article offers an important perspective on

copyright's present and, it is hoped, a needed compass for copyright's future.

